

Harish

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.246 OF 2022
WITH
INTERIM APPLICATION NO. 1832 OF 2022
IN
SECOND APPEAL NO.246 OF 2022**

Shri. Gangadhar Sidarshan Gullapalli ...Appellant/Applicant
Versus

Shri. Shivaji Baburao Vitkar & Ors. ...Respondents

Mr. S. M. Oak i/b Sagar Anant Joshi, for the Appellant/Applicant.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 13th MARCH, 2023**

P.C. :

1. Heard Mr. Oak, learned counsel appearing for the Appellant.
2. Mr. Oak submitted that, following substantial question of law is involved in this Second Appeal.

“Whether the learned Trial Court and the learned First Appellate Court are right in non suiting Appellant on the ground that, time is the essence of the contract?”

He also relied on Section 55 of the Indian Contract Act and Section 10 (before 2018 amendment) of the Specific Relief Act, 1973.

3. Before dealing with the substantial question of law raised by Mr. Oak, it is necessary to set out certain factual aspects :

(i) The present suit bearing Special Civil Suit No. 94 of 2007 has been filed on 9th August, 2007 *inter alia* seeking specific performance of suit agreement dated 13th October, 2006.

(ii) The following clauses of the said agreement dated 13th October, 2006 are very important. The same read as under :

“A. वर वर्णन केलेली शेतजमीन आजरोजी मी तुम्हास कायम खुषखरेदी रक्कम २,५१,०००/- अक्षरी रुपये दोन लाख एकावन्न हजार फक्त इतक्या रक्कमेस लिहून देण्याचे कबुल करून त्यापैकी या साठेखतापोटी आज इसारा म्हणून रक्कम रुपये ११,०००/- अक्षरी रुपये अकरा हजार मजला भरणा या सदरात नमूद केलेप्रमाणे मिळाले सबब भरण्याची काही तक्कार राहिलेली नाही. इसरा म्हणून दिलेली रक्कम वजा जाता राहिलेली रक्कम ही तुम्ही आम्हास खरेदीखताचे वेळी देण्याची आहे.

सदर शेतजमीनीचे खरेदीखत हे १ महिन्याचे मुदतीत करण्याचे याचे बंधन दोघांउभतांवर आहे व राहिल. या मुदतीत शेतजमीनीचे खरेदीखत हे मी तुम्हास करुन न दिल्यास तुम्हास कोर्टमार्फत खरेदीखत करुन घेण्याचा पूर्ण अधिकार आहे व राहिल त्याचे होणारे कोर्टखर्च नुकसानीस मी जबाबदार आहे व राहीन. तसेच सदर शेतजमीनीचे खरेदीखत हे वर नमूद केलेल्या मुदतीत तुम्ही पूर्ण करुन न घेतल्यास मी तुम्हास कोर्ट मार्फत खरेदी करुन घेण्यास भाग पाडेन त्याचे होणारे कोर्टखर्च नुकसानीस तुम्ही जबाबदार राहाल.

B.सदर शेतजमीन ही निर्वेध व निजोखमी आहे. त्यावर कोणाचा कोणत्याही प्रकारचा बोजा, टांच जप्ती वगैरे काही एक नाही आणि सदर शेतजमीन

मी यापुर्वी दुसरे कोणासही गहाण, दान, बक्षीस, खरेदी, भेट मृत्युलेख वगैरे अन्य दस्ताने हिन देवून गुंतविलेली नाही अशी मी तुम्हास खात्री देतो. सदर शेतजमीन ही कोणत्याही कोर्टातील वादाचा विषय नाही.

सदर शेतजमीन ही मी माझे प्रापंचीक अडचणीकरिता इतर कारणाकरिता रक्कमेची गरज असल्यामुळे विक्रीस काढली ती तुम्ही मजला सर्वात जास्त रक्कमेस मागणी केल्यामुळे व बाजारभावाप्रमाणे योग्य किंमत आल्यामुळे तुम्हासच या दस्तान्वये कायम खुषखरेदी लिहून देण्याचे कबूल करून हे प्रस्तुतचे साठेखत आजरोजी लिहून दिले आहे.”

The above clauses of the agreement clearly shows that, total agreed consideration was Rs. 2,51,000/- and Rs. 11,000/- were advanced as earnest money. The said clauses clearly shows that, the balance would be paid at the time of execution of sale deed. It is specifically mentioned that it is binding on both the parties to execute the sale deed within one month.

(iii) Thereafter, on 28th October, 2006, the parties agreed by executing a writing on the backside of said agreement dated 13th October, 2006. The same writing reads as under.

या साठेखतापोटी आजरोजी रोख रुपये ४०,०००/- अक्षरी चाळीस हजार फक्त दिलेत ते मला मिळालेत. तरी आजपावेतो एकूण रुपये ५१,०००/- अक्षरी रु. एक्कावन्न हजार पोहचलेत तक्रार राहिली नाही. तरी सदर साठेखताची मुदत दि. १२/१०/२००६ रोजी संपत

असून तुमचे व आमचे एकविचाराने वरील तारखेपासून
आठ (८) दिवसाची मुदत वाढ दिली आहे.

(Emphasis added)

Thus, what is recorded by said writing dated 28th October, 2006 is that, the Appellant has paid Rs. 40,000/- towards further consideration. It is further recorded that, the time as per the agreement was to expire on 12th October, 2006. However, the same is extended by eight days by mutual understanding. Thus, it is clear that, the time is extended only till 20th October, 2006.

(iv) It is further significant to note that on 16th December, 2006, the Respondent issued notice through his Advocate to the Appellant pointing out terms and conditions of the agreement and that the time as agreed in the said agreement had already expired. By that notice, the Appellant was called upon to make balance payment of Rs. 2,00,000/- with interest from 13th November, 2006 at the rate of 18% p.a. within a period of two days, failing which, the agreement stands cancelled and said amount of Rs. 51,000/- stands forfeited.

(v) Thereafter the Respondent No. 1 executed the sale deed in favour of Respondent Nos. 2 to 4 on 11th January, 2007.

(vi) The present suit was filed on 9th August 2007.

4. The learned Trial Court and the learned First Appellate Court both have recorded finding that the Appellant failed to prove his readiness and willingness and, therefore, Plaintiff is not entitled for relief of specific performance of agreement dated 13th October, 2006. On the basis of evidence on record and the terms and conditions of the suit agreement, both the Courts have concurrently held that, the time is the essence of the Contract and the Appellant i.e. Plaintiff has failed to perform his part of the Contract.

5. The learned Trial Court has dismissed the suit seeking return of aforesaid amount of Rs. 51,000/- and also seeking compensation. As far as the First Appellate Court is concerned, the First Appellate Court has held that the Appellant i.e. Plaintiff is entitled to return of earnest money with 6% interest.

6. Mr. Oak, learned counsel appearing for the Appellant has failed to point out any illegality or perversity in the concurrent findings recorded by both the Courts. Mr. Oak relied on Judgment of Supreme Court in the matter of **Sughar Singh Vs. Hari Singh (Dead) Through LRs. & Ors**¹ to substantiate the contention that time is not the essence of the contract. He relied on paragraph No. 2.1 and also paragraph No. 10 of the said decision which reads as under.

¹ 2021 SCC Online 975.

“2.1. That, one Ram Singh Executed the Agreement to sell in favour of original plaintiff Sughar Singh to sell the suit land for a total sale consideration of Rs. 56,000/-. Rs. 25,000/- was received by the executant as a part sale consideration at the time of the agreement. **The said agreement to sell was executed on 10.10.1976.** At this stage it is required to be noted that at the relevant point of time agreement to sell was not required to be registered. **As per the sale agreement the sale deed was to be executed within a period of 2 years. The time period of 2 years was extended at the instance of the vendor by the documents dated 30.09.1978 and 29.09.1981.** That, thereafter a further sum of Rs. 15,000/- was paid. The vendor agreed to receive the balance of Rs. 16,000/- at the time of execution of the sale deed vide Annexure P3. **Despite receiving Rs. 40,000/- towards part sale consideration and despite execution of the agreement to sell, the original vendor executed the sale deed of the suit land on 23.06.1984 in favour of defendant Nos. 2 to 5.** That, Thereafter, Sughar Singh-vendee filed the Civil Suit No. 254 of 1984 in the Court of learned Civil Judge, Mathura City, Mathura (for short “learned Trial Court”) against the vendor Ram Singh and Others. The persons in whose favour subsequently the sale deed was executed on 23.06.1984 were impleaded as defendant Nos. 2 to 5 also. **In the plaint it was also the specific case on behalf of the plaintiff that the defendant Nos. 2 to 5 are the real nephews of defendant No. 1 and defendant Nos. 2 to 5 and their father had managed to**

get defendant No. 1 in their control and that defendant Nos. 2 to 5 and their father have got one farzi document in the shape of sale deed without consideration executed by defendant No. 1 on 23.06.1984 and in their favour though they had full knowledge about the agreement to sell executed in favour of the Plaintiff.”

“10. Now, so far as the finding recorded by the High Court and the observations made by the High Court on Section 20 of the Act and the observation that even if the agreement is found to be duly executed and the plaintiff is found to be ready and willing to perform his part of the Agreement, grant of decree of specific performance is not automatic and it is a discretionary relief is concerned, the same cannot be accepted and/or approved. In such a case, many a times it would be giving a premium to the dishonest conduct on the part of the Defendant / executant of the agreement to sell. Even the discretion under Section 20 of the Act is required to be exercised judiciously, soundly and reasonably. The plaintiff cannot be punished by refusing the relief of specific performance despite the fact that the execution of the agreement to sell in his favour has been established and proved and that he is found to be always ready and willing to perform his part of the contract. Not to grant the decree of specific performance despite the execution of the agreement to sell is proved; part sale consideration is proved and the plaintiff is always ready and willing to perform his part of the contract would encourage the dishonesty. In such a situation, the balance should tilt in favour of

the plaintiff rather than in favour of the defendant - executant of the agreement to sell, while exercising the discretion judiciously. For the aforesaid, even amendment to the Specific Relief Act, 1963 by which section 10(a) has been inserted, though may not be applicable retrospectively but can be a guide on the discretionary relief. **Now the legislature has also thought it to insert Section 10(a) and now the specific performance is no longer a discretionary relief.** As such the question whether the said provisions would be applicable retrospectively or not and /or should be made applicable to all pending proceedings including appeals is kept open. However, at the same time, as observed hereinabove, the same can be a guide.”

7. In paragraph No. 2.1 of the above decision the Supreme Court has set out the factual aspects involved in the said case. Time of two years was stipulated in the agreement, the same period of two years was extended at the instance of the vendor by the documents dated 30.09.1978 and 29.09.1981. Thus it is clear that, the original agreement was executed in 1976 specifying period of two years to perform the said agreement and thereafter the said period of two years was extended in 1978 and thereafter again in the 1981 and the same was done at the instance of the vendor. It further appears that, the said vendor has accepted the further consideration from time to time. Thus, period initially agreed for completion of transaction of two year appears to have

been intended at least for more than three years. Therefore, the factual position before the Supreme Court is totally different. In the present case, not only in the said agreement dated 13th October, 2006 one month time was specified for completion of the transaction but also when the said period was extended on 28th October 2006 it was extended specifically only for eight days. Thus, factual position in the decision of the Supreme Court is totally different and will not apply to the present case.

8. The observation of Supreme Court in paragraph No. 10 clearly shows that, finding was recorded that the Plaintiff in the said case before the Supreme Court was ready and willing to perform his part of the contract. In the present case, on the basis of evidence on record, both the Courts have concurrently held that the Plaintiff has failed to prove his readiness and willingness. Therefore, the said Judgment of the Supreme Court is not applicable to the present case.

9. Mr. Oak also placed reliance on Section 55 of the Contract Act. Section 55 is regarding effect of failure to perform at a fixed time contract in which time is essential. Section 55 reads as under :-

“55. Effect of failure to perform at a fixed time, in contract in which time is essential. -When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before

specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, **if the intention of the parties was that time should be of the essence of the contract.** When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, **the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."**

Effect of such failure when time is not essential.- If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."

Effect of acceptance of performance at time other than that agreed upon.-If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time

other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.¹ If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."

(Emphasis added)

10. On the basis of Section 55 it is the submission of Mr. Oak that, time was not the essence of the Contract. However, as already set out the terms of agreement to sale dated 13th October, 2006 specifying one month time to complete the transaction as well as term which has been agreed on 28th October, 2006 by which period of agreement was extended only by eight days and thereafter, the notice sent by the Respondent No. 1 dated 16th December, 2006 clearly shows that time was the essence of the contract. In fact no benefit of first part of Section 55 can be taken by the Appellant as the agreement cannot be segregated. Therefore, there is no substance in the substantial question of law raised by Mr. Oak.

11. As far as Section 10 of the Specific Relief Act (before 2018

amendment) is concerned, the said Section 10 is not applicable to the present case. Section 10 of the Specific Relief Act (before 2018 amendment) reads as under :-

“10. Cases in which specific performance of contract enforceable.- Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced-

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.- Unless and until the contrary is proved, the Court shall presume-

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases :-

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.”

As both the Courts have concurrently recorded the finding that,

the Appellant has failed to perform his part of contract and he has failed to prove his readiness and willingness and as it is the finding of both the Courts that the Appellant has breached the contract, he is not entitled for any compensation as contemplate under Section 10 of the Specific Relief Act.

12. In the present case, the Respondent No. 1 has forfeited Rs. 51,000/- paid by the Appellant. The learned Trial Court has not granted any relief in respect of said Rs. 51,000/-. However, the learned Appellate Court has granted decree of Rs. 51,000/- with interest at the rate of 6% p.a. to the Plaintiff from the date of filing of the suit till its realization. Therefore, there is no substance in the Second Appeal.

13. Second Appeal is dismissed with no order as to costs. As the Second Appeal is dismissed, nothing survives in the Interim Application and the same is also dismissed.

14. At this stage Mr. Oak states that, the Appellant has deposited an amount of Rs. 2,00,000/- before the learned Trial Court and for that purpose, he has produced receipt dated 5th April, 2008. If the Appellant has deposited said Rs. 2,00,000/- and still said Rs. 2,00,000/- is lying in the Trial Court, the same be returned back to the Appellant with accrued interest, if any, to the Appellant in addition to the Decree of Rs. 51,000/- granted by the learned Trial Court. Before returning the said amount of Rs.

2,00,000/- the learned Trial Court to verify that, the said amount has not been already withdrawn by the Appellant.

[MADHAV J. JAMDAR, J.]