

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

SECOND APPEAL NO.108 OF 1987

Mrs Shamimbi w/o Sk.Moosa

.. Appellant
(Orig.Defendant No.2)

Versus

1. Nandkishore s/o Shaligram Jaiswal died per heirs and legal representatives :
- 1A. Shakuntalabai w/o Shaligram Jaiswal, Age 50 years, Occu.Household, R/o Janak Medical, Chelipura, Aurangabad
- 1B. Sanjay Nandkishore Jaiswal, Age 50 years, Occu.Household, R/o as above
2. Sugandabai w/o Mishrilal Gangwal, (died through L.Rs.)
- 2-1. Ashok s/o Mishrilal Gangwal, (died through L.Rs.)
- 2-A. Arunabai w/o Ashok Gangwal, Age 40 years, Occu.Household, R/o C/o Manish s/o Ashok Gangwal, C/o Bhusan Sharma, 1106/4, Lane No.1, 2nd Floor, Shalimar Park, Shahadra, New Delhi
- 2-B. Amrapali d/o Ashok Gangwal, Age Major, Occu. Education, R/o as above
- 2-C. Manish s/o Ashok Gangwal, Age Major, Occu.Education R/o as above

..Respondents
(R.No.1 - original plaintiff and
R.No.2 - original defendant no.1)

Mr P.V.Mandlik, Senior Counsel i/b Mr Amol Gandhi, Advocate for appellant

Mr A.P.Bhandari, Advocate for respondents 1A and 1B
Respondents no.2A to 2C served through paper publication

CORAM : N.W. SAMBRE, J.

**DATE OF RESERVING
THE JUDGMENT : 22.01.2015**

**DATE OF PRONOUNCING
THE JUDGMENT : 25.02.2015**

JUDGMENT

1. Heard Mr Mandlik, learned Senior Counsel for the appellant and Mr Bhandari, learned Counsel for respondents No.1A and 1B.
2. Mr Mandlik, learned Senior Counsel for the appellant has tendered the draft substantial questions of law and which according to him are required to be considered for the purpose of the hearing of present second appeal as at the time of admission of second appeal, no question of law was framed.
3. The appellant is original defendant no.2 to Regular Civil Suit No.84 of 1982, initiated by respondent no.1 - plaintiff for specific performance of contract and for possession of the property consisting of Southern half portion of plot bearing Municipal No.1-19-97 bearing CTS No.7507, admeasuring 44.6 East-West and 15 feet North-South, situated at Chelipura, Murginala, Aurangabad.
4. The defendant no.1 i.e. the present respondent no.2 through his legal representatives was owner of the suit property. The defendant no.1 entered into an agreement of sale of the suit plot

with the plaintiff for consideration of Rs.7,901/-. Out of the said amount, Rs.901/- was paid to the plaintiff as an earnest money and balance amount of consideration of Rs.7,000/- was to be paid at time of execution of sale-deed.

5. The defendant no.1 who was owner of the property, was bound to supply accurate measurement and document of her title before execution of the sale-deed and as the defendant no.1 failed to take steps after execution of the agreement of sale i.e. the *isar pawti* dated 7th November 1979, the plaintiff - respondent no.1 was required to issue notice to defendant no.1 calling upon her to comply with the four requirements, viz. (a) area of suit property, (b) correct city survey record, (c) clarification about right of easement; and (d) objection of real sister to the title of defendant no.1.

6. The plaintiff urged that he was always ready and willing to perform his part of contract, so as to get the sale-deed executed, as according to him, he had purchased non-judicial stamp paper of Rs.400/- on 15th October 1979 and had also obtained a Bank draft for an amount of balance consideration of Rs.7,000/- for paying the same to the defendant no.1.

7. According to the plaintiff, due to objection which came to his knowledge, the sale-deed could not be executed and the defendant no.1 had not responded/complied with the clarification and compliance sought by him vide notice, cited supra.

8. The plaintiff as such was required to issue another notice on 29th September 1981 by R.P.A.D., in reply to which the defendant no.1 had informed that the property was already sold away to defendant no.2 in 1979, i.e. to the present appellant. As the plaintiff got information that defendant no.1 had executed sale-deed in favour of present appellant on 30th January 1980, same has prompted him to file suit for specific performance of contract, possession of plot, removal of tin shade and in alternate refund of earnest money of Rs.901/-.

9. To the said suit, the defendant no.1 filed her written statement at Exh.18 and admitted the agreement of sale alleged by the plaintiff. She claimed that the clarification sought by the notice dated 7th November 1979 by the plaintiff was with an intention to frustrate the contract. She further claimed that at the time of entering into agreement, the plot was measured and the city survey record was shown to the plaintiff which was verified by him. According to her, there was no objection to the title, as the sister of defendant no.1-Kacharabai had already relinquished her share by a registered document. She further claimed that the time was the essence of contract, as the amount that was to be received out of present transaction, was to be utilised for the purchase of new flat by her. She further claimed that it is the case of repudiation of contract. She further claimed that as the plaintiff had failed to pay the amount in time, the suit property was

transferred to the appellant for a consideration of Rs.8,000/-. It is further claimed by defendant no.1 that due to non-admission of amount as per schedule by the plaintiff, the defendant no.1 was required to pay Rs.650/- towards the interest to the Builder of Sadhana Apartment towards delayed payment for purchase of flat. As such, she has recovered Rs.99/- etc. in price from defendant no.2 and claimed that Rs.500/- be paid by plaintiff to her as compensation.

10. The defendant no.2 filed written statement and claimed that she was purchaser of the property without notice, as the alleged transaction between the defendant no.1 and plaintiff was not brought to her notice. She further claimed that an agreement was entered into for purchase of suit property with the defendant no.1 on 10th January 1979 for a consideration of Rs.8,000/- and she paid Rs.4,000/- as an earnest money and the balance amount of consideration was to be paid at the time of registration of sale deed. She further claimed that she has spent Rs.10,000/- for construction and development of the plot.

11. Having regard to the above referred background, learned trial Court framed issues at Exh.22 and answered the same accordingly, which read thus :

ISSUES

1. Does plaintiff prove that he has been always ready and willing to perform his part of the contract ?

2. Does plaintiff prove that the Defendant no.1 failed to perform his part of the contract to execute the sale-deed ?
3. Does Defendant No.1 prove that she is entitled to claim compensation of Rs.551 for the loss sustained due to non performance of the part of the contract by the plaintiff ?
4. Does Defendant no.2 prove that she is *bona-fide* purchaser for value without notice of any agreement in favour of the plaintiff ?
5. Is the plaintiff entitled to specific performance of the contract ?
6. In the alternate, is the plaintiff entitled to refund of earnest money ?

FINDINGS

1. Yes
2. Yes
3. No
4. No
5. Yes
6. Does not arise

12. Learned trial Court decreed the suit of the plaintiff - respondent no.1 and ordered that both the defendants i.e. appellant herein and defendant no.1 shall execute sale-deed of the suit property in favour of the plaintiff within one month after the

plaintiff deposits the amount of Rs.7,000/- in the Court. The plaintiff was given one month's time to deposit the said amount in the Court and failure to execute the sale-deed by the defendants entail the plaintiff to get the sale-deed executed through the Court. The defendant no.2 was given liberty to remove the structure.

13. The important aspect of matter is, the original owner – defendant No.1 did not prefer any appeal against the said verdict, however, the subsequent purchaser i.e. defendant no.2 chose to prefer Regular Civil Appeal No.31/1984 in the Court of 3rd Additional District Judge, Aurangabad. The 3rd Additional District Judge, Aurangabad while dealing with the points for consideration framed following questions and answered the same accordingly :

QUESTIONS

1. Whether the respondent no.1 Nandkishor had established that he had been ready and willing to perform his part of the contract but the respondent no.2 had neglected to fulfill his part of the contract ?
2. Whether appellant had succeeded in proving that she was *bona fide* purchaser for value without notice of prior agreement ?
3. Was respondent no.1 entitled to the specific performance of contract ?
4. Whether there was any error in the judgment and decree passed by the trial Court ?

ANSWERS

1. Yes
2. No
3. Yes
4. No

14. The lower appellate Court dismissed the appeal preferred by the present appellant, which has resulted into filing of the present appeal.

15. Mr Mandlik, learned Senior Counsel representing the interest of the appellant has sought to urge that the time was essence of the contract and according to him, the plaintiff - respondent no.1 since has failed to honour the demand within the time stipulated, the suit ought to have been dismissed. He further submits that the requirements of Section 16 (c) of the Specific Relief Act are not satisfied.

16. Mr Mandlik, learned Senior Counsel further urged that unless the sale-deed executed in favour of defendant no.2 by the defendant no.1 i.e. Exh.29 is set up, the Court ought not to have passed the decree for execution of sale-deed as prayed by the plaintiff. He has placed reliance upon the two judgments of the Apex Court, i.e. **Smt. Kamal Rani Vs. Smt.Chand Rani**, reported in **AIR 1980 DELHI 188** and **Bebi Prasad & Ors. Vs. Smt.Maika & Ors., reported in AIR 1972 ALLAHABAD 376** so as to canvass that the time was essence of contract and according to him, the equity

ought not to have been availed in favour of the plaintiff as the suit was filed after a period of two years. He further claimed that the suit against the present appellant was not tenable as she was not party to the contract at the time of entering into an agreement Exh.33. He submits that the verdicts of both the Courts below are contrary to the provisions of Sections 16, 20 and 31 of the Specific Relief Act, as according to him, the plaintiff was not ready and willing to perform his part of contract and as such, the discretion for grant of specific performance ought not to have been exercised in favour of the plaintiff, as such exercise of discretion is not guided by the sound judicial principle. He further urged that for want of prayer for declaration of sale-deed Exh.29 as null and void, the suit ought not to have been decreed.

17. While countering the above referred submissions, Mr Bhandari, learned Counsel for the respondents 1A and 1B submits that the contentions raised by the present appellant does not call for interference in the second appellate jurisdiction, as according to him, both the Courts have concurrently held against the present appellant as regards grant of specific performance. He submits that by cogent evidence brought on record, it was already proved that his client was ready and willing to perform his part of contract viz., issuance of notice dated 7th November 1979, no reply given by defendant no.1, the second notice by the plaintiff on 29th September 1981, the purchase of stamp paper of Rs.400 on 15th October 1979, i.e. Exh.34 and preparation of demand draft of Rs.7,000/-. He further submits that case of the appellant that she was a *bona fide* purchaser of the

suit property is incorrect, as according to him, in the written statement, it was claimed that there was an agreement dated 10th January 1979 in between defendant no.1 and defendant no.2, however, no such agreement was placed on record. He further submits that no public notice was issued before purchasing the property in question. My attention is invited to the fact that the defendant no.1 has not brought the agreement dated 10th January 1979 on record, as according to him, the same was not traced. He further urged that it was always open for the defendant no.1 to show his *bona fides* by adducing secondary evidence in support of the said document. He further urged that the defendant no.1 never entered into the witness box, however, her husband Mishrilal had entered in witness box and admitted the purchase of non-judicial stamp paper of Rs.400/- and drawing of demand draft of Rs.7000/-. According to him, the execution of agreement was also not disputed in between the plaintiff and defendant no.1. He has invited my attention to the fact that there was no necessity to challenge the sale-deed in favour of defendant no.2 by defendant no.1, as both are impleaded as party - defendants and the relief of execution of sale-deed sought is rightly granted by the Courts below as against both the defendants. In support of his contentions, he further urged that no question of law is involved in the present second appeal, particularly a substantial question of law so as to entertain the present second appeal. He urged that the delay in filing the suit was not intentional and same was properly explained and cannot be read to the detriment of present respondent no.1.

18. According to Mr Bhandari, the appellant herein is not a *bona fide* purchaser and cannot claim better title than the original owner i.e. defendant no.1. He submits that as the defendant no.1 has not challenged the verdicts, there is hardly any scope of interference at the behest of present appellant-defendant no.2. In support of his contentions, he has placed reliance on the law laid down by the Apex Court in the matter of **Mademsetty Satyanarayana Vs. G.Yelloji Rao and ors.**, reported in **AIR 1965 SUPREME COURT 1405(1)** so as to canvass that mere delay in initiating the action in the Court of law in Indian Jurisprudence, same won't amounting to abandonment or waiver of a claim in the light of provisions of Specific Relief Act. So as to canvass the scope of Section 100 of the Code of Civil Procedure, he has placed reliance on the law laid down by the Apex Court in the matter of **Santosh Hazari Vs. Purushottam Tiwari (dead) by L.Rs.**, reported in **AIR 2001 SC 965**.

19. Having considered the rival contentions of the parties, it is noticed that the learned trial Court has, in detail considered the case of the present appellant, as is sought to be put forth by her vide Exh.21 and also that of the case in defence set up by the defendant no.1 - original owner of the property at Exh.18. The learned trial Court, while dealing with the evidence of Nandkishor, PW-1 at Exh.32, has taken into account the execution of agreement of sale and proving of the same. The learned trial Court has taken into account the alleged objection/clarification sought from the defendant in regard to the suit area, correction of city survey record, right of easement,

claimed by the adjacent owner and the sister's title over the suit property as the suit property was received from her mother. The learned trial Court has taken into account the act of non-replying the notice of the plaintiff dated 7th November 1979 and has discussed about the area of the plot, the adjoining owners and the objections raised by them, the area mentioned in Exh.30, P.R. Card. The learned trial Court has noticed that defendant no.1 has not entered into witness box but on her behalf her husband Mishrilal has deposed at Exh.52. The learned trial Court has taken into account his testimony when he has objected to the notice issued as baseless one. The learned trial Court was alive of the fact as regards the time as essence of contract and based on the judgment of the Apex Court in the matter of **Gomathinayadam Vs. Palamiswami**, reported in **AIR 1967 S.C.868**, has tested the conduct of the parties to the present proceedings. The learned trial Court noticed that though there was a specific stipulation in the agreement to sale that time will be essence of the contract, however, noted that the non-performance of contract is to be attributed to whom ? The learned trial Court noticed that within five days, after the agreement, the plaintiff went to Architect, got prepared the map of the suit property and on 15th October 1979, paid Rs.400/- to Mishrilal to purchase stamp paper for execution of the sale-deed. The learned trial Court has also noted that the demand draft of Rs.7,000/- from the Bank was obtained for making payment to the defendant no.1 at the time of execution of sale-deed. It is established before the learned trial Court, on 15th October, 1979 the plaintiff was ready to get the sale - deed executed,

however, in view of mistake noticed in city survey map, he was confused. The said confusion was also sufficiently established by way of oral and documentary evidence before the Court below and as such, observed that the plaintiff established that he was always ready and willing to perform his part of contract and the sale-deed could not be executed due to failure on the part of defendant no.1. The learned trial Court while dealing with the case of the present appellant as to whether she was a *bona fide* purchaser of the suit property or not, has noted that the defendant no.2, i.e. present appellant has not entered into witness box. Her husband Sk.Moosa deposed at Exh.42 who was not aware about the contract between plaintiff and defendant no.1. The learned trial Court noticed that though it is alleged that the agreement took place on 10th January 1979 between defendant Nos.1 and 2 and an amount of Rs.4,000/- was paid as an earnest money at that time, the learned trial Court noticed that the witness of defendant No.2 Sk.Moosa has deposed that he was ignorant of the public notice issued by the plaintiff about his transaction with defendant no.1 in relation to the suit property, however, noted that the house of the defendant no.1 is quite near to the house of defendant no.2 and the suit property is located in front of house of defendant no.2. The learned trial Court, having regard to the evidence of plaintiff and Mishrilal has noticed about the measurement of the suit property and who were informed about the contract in between the plaintiff and defendant no.1, however, it is deposed by him that the said contract was repudiated. The learned trial Court having regard to the evidence of Sk.Moosa, has drawn conclusion that he was aware of the previous

contract and it was his duty to cause appropriate enquiry in the matter before purchasing the suit property and as such, noticed that he was not a *bona fide* purchaser. The learned trial Court noticed that as the sale deed could not be executed due to fault of defendant no.1 and the defendant no.2 has purchased the property with knowledge of previous contract, as such, it is not open for the defendant nos.1 and 2 to object to the claim of plaintiff. The learned trial Court observed that the suit was filed within month after issuance of the notice Exh.30 and as such, decreed the same.

20. The learned lower appellate Court re-considered the entire judgment delivered by the learned trial Court and expressed its agreement thereto. The lower appellate Court has taken into account the evidence at Exh.33, 34, 35, 37 and 38 and so also the evidence of PW-1, i.e. plaintiff and Architect Syed Azim. The learned lower appellate Court has taken into account the fact that respondent no.2 Sugandhabai has not entered into the witness box and Mishrilal, her husband deposed in support of their defence, the demand notice Exh.53, so also the non-entrance of appellant herself into the witness box, but her husband Sk.Moosa, copy of the sale-deed dated 30th January 1980 Exh.29 in favour of defendant nos.1 and 2, the property card Exh.30. The lower appellate Court, having regard to above referred documentary evidence i.e. Exh.33, 34, 35, 37, 38, 53 and 30 has observed that the respondent no.1 herein was always ready and willing to perform his part of contract. It is noticed that the respondent no.2 to the said appeal i.e. present respondent no.2 – original owner has failed to perform her part of contract. The lower appellate Court,

having regard to the notice Exh.35, the second notice Exh.37, the clarification which was sought in notice Exh.34, has reached to a finding that the present respondent no.1 had established that he was ready and willing to perform his part of contract and the respondent no.2 failed to perform her part of contract.

21. The lower appellate Court has also looked into the case of the present appellant whether appellant was a *bona fide* purchaser and has formed an opinion that the appellant herein purchased the property while she was having knowledge about the transaction in between the plaintiff and defendant no.1 and that there was certain activity going on the suit property as regards measurement etc., still proceeded to purchase the property.

22. In the light of above observations in detail made by both the Courts below, in my opinion, the claim put forth by the present appellant who is a subsequent purchaser cannot have a better claim than that of original owner, defendant no.1 who has chosen to accept the verdicts as it is.

23. The support placed by the appellant upon the judgment of Delhi High Court in the matter of readiness and willingness and time as essence of contract is concerned, in my opinion, learned Court below has taken into account while decreeing the suit, the law pronounced by the Apex Court in the matter of **Gomathinayadam Vs. Palamiswami** (cited supra) and having regard to the evidence brought on record in the light of pleadings, has reached to a conclusion that the time was not essence of contract. In fact, even

the judgment cited by learned Senior Counsel for the appellant, has observed that generally in a suit for agreement to sale of immovable property, time will not be essence of contract, however, it could be held so having regard to the express stipulations. The observations made in paragraphs 16 and 19 are relevant.

24. So far as the judgment of Apex Court in the matter of **Gomathinayadam Vs. Palamiswami** (cited supra), cited by the learned Counsel for the respondent is concerned, this Court must take into account the discretion vested in the Courts below in the course qua Section 22 of the Specific Relief Act to grant specific relief. The Court while considering the English Interpretation of the waiver or abandonment of claim by virtue of delayed occasion, has observed in paragraph 11 of the said judgment, which reads thus :

“11. The result of the aforesaid discussion of the case law may be briefly stated thus : While in English mere delay or laches may be a ground for refusing to give a relief of Specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression “waiver” in its legally accepted sense, namely, “waiver is contractual and may constitute a cause of action; it is an agreement to release or not to assert a right”, see Dawson's Bank Ltd. v. Nippou Menkwa Kabushiki Kaisha, 62 Ind App 100 at p. 108 : (AIR 1935 PC

79 at p.82). It is not possible or desirable to lay down the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in including the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief.”

25. Learned Counsel for the respondent rightly placed reliance upon the judgment of Apex Court in the matter of **Santosh Hazari Vs. Purushottam Tiwari (dead) by L.Rs.**, (cited supra), wherein Apex Court while dealing with the issue of scope of Section 100 of the Code of Civil Procedure, in paragraph 15 observed thus :

“15. A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by

reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi & Ors. Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC 114). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to

displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.(See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh., AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

26. In view of above, no case for interference is made out. The present second appeal lacks merit, which is against concurrent findings, as such fails and stands dismissed.

(N.W. SAMBRE, J.)