

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

SECOND APPEAL NO.: 101 OF 1993

Dagdu Satvaji Sakhare,
Age: 35 years, Occu.: Private Service,
R/o Kasari, Tq. Majalgaon, now R/o
Shevgaon, Tq. Shevgaon, Dist.
Ahmednagar.

... **APPELLANT**
[ORIG. DEFENDANT]

VERSUS

Narsu S/o Namdeo Dehadrai,
Dead through L.Rs.

- (a) Alka Gokul Bhoj;
- (b) Saraswati Chandrakant Shirsagar;
- (c) Kalinda Bansidhar Chatur;
- (d) Indu Narsu Teli (deleted).
- (e) Godhawari Narsu Dehadrai;
- (f) Sundarlal Narsu Dahadari;
- (g) Gorakh Narsu Dehadrai;
- (h) Machindra Narsu Dehadrai;
- (i) Mandakini Dagadu Sakhare.

... **RESPONDENTS**

Mr. S. V. Jadhav Patil, Advocate for the Appellant.
Mr. S. V. Natu, Advocate for Respondent Nos.1A, C, F, G and H.

@@@

CORAM:-

T. V. NALAWADE, J.

DATED:-

15th SEPTEMBER, 2015.

JUDGMENT:

1. The appeal is filed to challenge the judgment and decree of Regular Civil Suit No.158 of 1980 which was

pending in the Court of learned Civil Judge, Senior Division, Shevgaon and also to challenge the judgment and order of Regular Civil Appeal No.363 of 1985 which was pending in the Court of District Judge, Ahmednagar. The suit filed by the present Respondent Narsu for relief of possession of house property is decided in his favour. Both the sides are heard.

2. The appeal was admitted by this Court, other Honourable Judge, by holding that the substantial questions of law can be formulated on the basis of points mentioned in ground No.III, V and VI. No specific substantial questions of law were formulated and they can be formulated, as under:

- (i) *Whether the Courts below have committed error in not considering the relevant material on record and giving decree of possession?*
- (ii) *Whether the Courts below have committed error in not giving protection of provision of Section 53A of T.P.Act when the defendant had paid sufficient portion*

of consideration to plaintiff under agreement of sale?

(iii) Whether the Courts below have committed error in holding that time was essence of contract and the defendant failed to prove that he was and has been ready and willing to perform his part of contract?

3. Plaintiff is father in law of defendant. It is the case of plaintiff that there was the agreement between him and defendant for sale of the suit property for consideration of Rs.5,000/-. The agreement took place on 5th August, 1977 and on that day the part of the consideration as Rs.3,000/- was paid by defendant to plaintiff. It is contended by the plaintiff that the remaining amount of Rs.2,000/- was to be paid within 6 months by the defendant and then the sale deed was to be executed. It is contended that the possession was given of the property to the defendant but he did not show readiness and willingness to perform his part of the contract and he did not pay the amount within time. It is the case of plaintiff that he gave notice through Advocate on 14th September, 1978 and asked the defendant to pay the remaining amount and get executed

the sale deed. It is contended that specific date was given as 21st February, 1978 by him to the defendant to remain present in the office of Sub Registrar but even after receipt of the notice, the defendant did not remain present in the office with the amount and so the sale deed could not be executed. It is contended that due to these circumstances, the defendant has lost his right to get the sale deed executed and the plaintiff has the right to get back possession of the house which belongs to him. The suit was filed on 8th August, 1980.

4. The defendant admitted in his written statement that there was written agreement and the time of 6 months was fixed. He also admitted that notice was received by him. He has contended that after 6 months he requested the plaintiff to execute the sale deed but plaintiff avoided to execute the sale deed and then gave notice. He has contended that the plaintiff has no right to cancel the agreement of sale and he is still ready to purchase the property. He contended that he was taking steps for filing suit for specific performance of the contract.

5. Issues were framed on the basis of aforesaid pleading and both the sides gave evidence. The Courts below have held that there was the agreement between the parties but the defendant failed to get the sale deed executed within prescribed time and the time was essence of contract. The Courts below have held that the defendant has failed to prove that he was ready and willing to perform his part of the contract. Courts below have held that defendant is not entitled to protection of provision of Section 53A of the T.P.Act and so the suit filed for possession is decreed in favour of plaintiff.

6. The evidence given by the plaintiff is consistent with the aforesaid pleading. There is record like notice issued by him, which is not disputed. In the written statement itself defendant has admitted that he could not even reply the notice though he has contended that he was sick at that time. Nothing could be brought on record during cross examination of the plaintiff to create probability that defendant had offered the remaining consideration within prescribed time or even after the time limit given in the agreement.

7. In rebuttal, defendant examined himself and he examined his wife, the daughter of plaintiff. Defendant has tried to say that he had paid more amount, like amount of Rs.100/- for expenses and he had paid Rs.200/- and Rs.100/- on two different occasions after 8 days of the date of the agreement as part of consideration. He has tried to say that he had visited the residential place of plaintiff to give money 4 to 5 times and one Dr. Purnale was in his company but the plaintiff did not give response.

8. The cross examination of defendant shows that he was not having Rs.2,000/- and only after 10 months of the date of agreement he could collect the amount of Rs.2,000/-. However, there is no record with him to show that after 10 months he had really collected such amount. He has tried to say that he had kept amount in his account from State Bank but extract of the said account was not produced to show that he was ready with that amount. The evidence of his wife, on the other hand, shows that her husband had no job and they were facing financial crisis. Her evidence shows that they had collected the amount of

Rs.2,000/- but such amount was with them after about 5 years of the date of the agreement. She has tried to improve their case by saying that they had given additional amount of Rs.500/- on the date of the agreement but the amount was handed over to the wife of plaintiff. She has tried to say that she used to give money to plaintiff.

9. From the nature of evidence given by the defendant it can be said that they had no money and due to that they could not make the payment of remaining consideration within 6 months, the time given for completion of the contract. The record shows that defendant could not produce the agreement which was in possession of defendant. Lamé excuse was given that the document was given to the plaintiff but that is not acceptable. It is also stated in evidence that the document was registered. In that case, they could have collected copy of registered document from the office of Sub Registrar and that could have been produced as secondary evidence but that is also not done. For taking protection of provision of section 53A of T.P.Act these things ought to have been done. Further, the readiness and willingness of party like defendant is a

basic condition for getting protection or provision of section 53A of Transfer of Property Act. Admittedly, no suit for specific performance was filed by defendant and they did not file counter claim of any kind in the suit. In view of these circumstances there was no alternative before the Courts below than to give decree of possession. So, aforesaid points are answered against the appellant and the appeal is dismissed.

10. In view of final disposal of the second appeal, the pending civil applications in this second appeal do not survive any further and they are disposed of accordingly.

[T. V. NALAWADE, J.]

Dated:15/09/2015.
ans/101