

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 183 OF 2015
WITH
CIVIL APPLICATION NO. 4815 OF 2015

Dr. Miss Kunda d/o. Khemraj Choudhary**Appellant.**

Versus

Smt. Mathurabai w/o. Mahadu Jadhav
(Deceased) and others**Respondents.**

Mr. A.D. Kasliwal, Advocate for appellant.

Mr. P.R. Katneshwarkar h/f. Mr. N.T. Tribhuwan, Advocate for
respondent Nos. 1 to 3.

Mr. D.V. Soman h/f. Mr. B.B. Yenge, Advocate for respondent No.
2.

CORAM : T.V. NALAWADE, J.
DATED : 1st September, 2015.

ORDER :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 135/2012 which was pending in the Court of Ad-hoc District Judge, Vaijapur, District Aurangabad. The suit filed by the present appellant bearing Special Civil Suit No. 66/2004 which was pending in the Court of Civil Judge, Senior Division, Aurangabad and which was filed for relief of specific performance of contract, was decided in favour of appellant by the trial Court and this decision is set aside by the first appellate Court. Both the sides are heard.

2) The learned counsel for appellant submitted that substantial questions of law need to be formulated on the basis of grounds mentioned in the appeal memo, which are as follows :-

(i) Non consideration of the documentary as well as oral evidence on record and relying on the evidence which is not admissible as per the Evidence Act is considered.

(ii) Non framing of the points for determination by the lower appellate Court as per Order 41 Rule 31 of C.P.C.

(iii) Whether the facts and circumstances of the case can it be said that, lower appellate court is justified in setting aside well reasoned judgment passed by the lower court, without recording any reasons, meaning thereby can it be said that, the same is judgment in the eyes of law.

(iv) Whether the lower appellate court is justified in setting aside well reasoned judgment delivered by the lower court in the fact and circumstances when oral as well as documentary evidence adduced by the Appellant was remained unchallenged.

(v) Whether the lower appellate court is justified in recording the finding for point No. 1 and 3 in affirmative in view of the ratio laid down in Smt. Chandrani's case reported in AIR 1993 SC 1743 and the oral evidence adduced by the Appellant gone unchallenged and the respondents have not adduced any oral evidence.

(vi) Whether the lower appellate court is justified in recording the finding that the time was the essence of contract and the suit is barred by limitation ignoring the oral evidence which remain unchallenged and by virtue of Mutation Entry No. 193 area of the suit land has been changed, can it be said that, suit for specific performance in respect of the immovable property time can be the essence of the contract.

(vii) Whether the lower appellate court is justified in reversing the well reasoned judgment on sympathetic ground, ignoring the ratio laid down in Chandrani's case.

(vii) Whether the lower appellate court is justified in recording the finding for point No. 2 in negative when evidence of the Appellant remained unchallenged and furthermore in view of the ratio laid down by the

Hon'ble Apex Court, the party concerned should not carry money with him every now and then and when it has been stated on oath the Appellant was/is ready and willing to perform her part of contract.

3) It is the case of appellant/plaintiff that deceased Smt. Mathurabai Jadhav was owner of land Gat No. 15, admeasuring 2 Acres 35 Guntas, situated at village Naigaon, Tahsil Gangapur and she had agreed to sell this property to the plaintiff for consideration of Rs. 2,35,000/- under written agreement dated 16.11.1988. It is the case of plaintiff that she has paid Rs. 50,000/- as a part of consideration to Smt. Mathurabai and the remaining amount was to be paid within four months from the date of agreement and then the sale deed was to be executed. It is contended that there were some technical hurdles for execution of the sale deed and so, the sale deed was not executed within the prescribed time. It is the case of plaintiff that there were changes made in the revenue record regarding area of the suit property and as the changes were not finalized, the sale deed was not executed. It is the case of plaintiff that after such changes, she requested the promisor Smt. Mathurabai to execute the sale deed and Mathurabai said that, she wanted to take consent of her daughters, defendant Nos. 2 and 3 and so,

further time was taken by Mathurabai. It is the case of plaintiff that she was always ready and willing to pay the remaining amount of consideration, but the defendants did not show eagerness to fulfill their promise by executing the sale deed. It is contended that ultimately, plaintiff sent a notice by Registered Post A. D. on 19.7.2003 through her advocate, asking the defendants to complete the sale deed, but the notice was not accepted by the defendants. She had prayed for relief of specific performance of the contract as contained in aforesaid written document and in alternate, she had prayed for equitable reliefs.

4) Defendant Nos. 2 and 3 filed their written statement and denied everything. They denied that their mother had executed agreement in favour of plaintiff and she had accepted part of consideration under the agreement. The defendants contended that as the suit was filed after 15 years and 2 months from the date of so called contract, the suit was hopelessly time barred. They have shown ignorance about the proceeding, if any, started for correcting area of the suit land in the revenue record. It is their case that they have become absolute owners of the land after the death of their mother. They have contended that plaintiff had never intimated that there was such agreement between the plaintiff and their deceased mother. They have

denied that they had refused to accept the notice sent by the advocate of the plaintiff. They had requested for rejection of the plaint under Order 7 Rule 11 of Civil Procedure Code.

5) It appears that the defendants were not allowed to cross examine the plaintiff and defendants did not give oral evidence . The trial Court held that the suit is within limitation. On the basis of oral evidence, the trial Court decreed the suit.

6) The first appellate Court considered the following points :-

- (i) Whether the time is essence of contract ?
- (ii) Whether the plaintiff had proved that she was ready and willing to perform her part of contract ? and
- (iii) Whether the suit was time barred ?

All the three points are answered against the plaintiff by the first appellate Court.

7) The appellate Court has considered the circumstance that during the lifetime, Smt. Mathurabai had given the suit property to the daughters, defendant Nos. 2 and 3 and

accordingly, the mutation was sanctioned on 11.12.2000. The appellate Court has also observed that this fact was within the knowledge of plaintiff and that can be inferred in view of the facts and circumstances of the case. The appellate Court has held that this act of Mathurabai could have been treated as the act of refusal, even if the other circumstances are ignored and as the suit is not filed within three years from the date of the sanction of the mutation, it is held that the suit is barred by limitation. It is also observed that for about 15 years the remaining consideration was not offered and so, the plaintiff failed to prove that she was ready and willing to perform her part of contract. In view of the contents of the agreement, the first appellate Court has held that the time was essence of contract. The appellate Court has discussed the provisions of section 16 of the Specific Relief Act and has referred some reported cases.

8) Copy of the agreement was produced and the execution of this document was proved in the trial Court. In the pleadings itself, it is admitted by the plaintiff that she was to pay the remaining amount of consideration, which was around Rs. 1.85 lakh, within four months from the date of agreement. There is the mention in the agreement that the sale deed was to be

executed by the promisor Smt. Mathurabi within four months from the date of agreement. There was specific mention that the time of four months was to be counted from 5.11.1988, which was the date of agreement. The daughters of Smt. Mathrabai had not signed on this document which is titled as 'Isar Pavti'. No possession of land was given. The document does not show that there was any hurdle in execution and registration of sale deed. Thus, from the agreement, it can be said that there was no necessity of getting permission of any authority for execution of the sale deed and registration could not have been refused by the Sub-Registrar. In view of these circumstances and specific pleading in the plaint that the remaining consideration was to be paid within four months from 5.11.1988, it was necessary for the plaintiff to specifically plead about particulars that within this period she had offered to give remaining consideration and she had shown readiness and willingness to perform her part of contract. These circumstances have created probability that plaintiff was not having money to pay the remaining consideration on the date of agreement. From the pleadings, it can be said that it is very vague and the contention that some changes were made in the area of revenue record during that time is also not substantiated. The plaintiff has contended that first time in writing, she sent notice to Smt. Mathurabai through

advocate on 19.7.2003. In para 6 of the pleading, there is mention that plaintiff knew that the land was transferred in the names of defendant Nos. 2 and 3 under mutation dated 11.12.2000. No explanation is given as to why she did not take steps even after getting the knowledge of this mutation. In any case, this mutation was effected after completion of three years from the date of agreement. These circumstances need to be considered for ascertaining both, the cause of action for the suit and readiness and willingness of plaintiff to perform her part of contract.

9) The provision of Article 54 of the Limitation Act gives period of limitation for such suit and it runs as follows :-

Description of suit	Period of limitation	Time from which period begins to run
For specific performance of a contract	Three years	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.

There are two parts, the circumstances, on the basis of which the cause of action can arise in this Article and they are :-

- (i) when the date of performance is fixed and the promisor has not performed his part of contract within prescribed period, and

(ii) when the date, time is not fixed, but the plaintiff can gather that the performance is refused by the promissor.

Thus, the period of limitation of three years mentioned in Article 54 will start to run from the date of cause of action which can be ascertained on the basis of aforesaid two circumstances.

10) For ascertaining the date of cause of action, the provisions of Specific Relief Act and Contract Act also need to be considered. The provision of section 9 of Specific Relief Act 1963 runs as under :-

"9. Defence respecting suits for relief based on contract.- Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts"

In view of this provision, some provisions of Contract Act in the present case need to be referred and they are the provisions of sections 46 and 55. They run as under :-

"46. Time for performance of promise, where no application is to be made and no time is specified.-Where, by the contract, a promisor is to perform his promise without

application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.- The question " what is a reasonable time " is in each particular case, a question of fact."

"55. Effect of failure to perform at 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 time, 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.

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."

11) The provision of section 46 shows that when no time is fixed for performance of contract, it needs to be performed within reasonable time. The explanation to that section shows that "what is reasonable time" depends on facts and circumstances of each particular case and it is a question of fact. When in the agreement, no other condition is mentioned like in the present case, it becomes easy to ascertain the reasonable time within which the promisor was expected to execute the sale deed and the same can be said in respect of the promise of the plaintiff to pay the remaining consideration. Thus, even if the time limit of four months mentioned in the agreement is ignored, it is not difficult to ascertain the date of cause of action in the present case.

12) The provision of section 55 of the Contract Act shows that if the time is fixed and the promisor fails to perform his part of contract within the specified time, the contract becomes voidable at the option of promisee. In such a case, it is open to the promisee to accept the performance even after fixed time as

contract becomes only voidable. Thus, the contract had become voidable at the instance of promisee, if it is treated that time was essence of contract. If the time was not essence of contract, in that case, promisee becomes entitled to get compensation from the promisor for loss caused to him due to failure of promisor of performance of his part of the contract. Thus, in both the cases the promisee can wait for the performance of the promise by the promisor, but when the time was essence of contract, the promisee cannot claim compensation for loss occasioned for non-performance of promise at the time agreed unless he had given notice to promisor of his intention to recover, to get compensation also. These provisions show that they are with regard to breach of terms and conditions of the contract and they have no reference to the law of limitation.

13) From the aforesaid two provisions of Contract Act and the law of Limitation already quoted, in the present case, it can be said that even after it is presumed that time was not essence of contract, the plaintiff ought to have filed suit within reasonable time from the date of agreement. It ought to have presumed by plaintiff that the promisor had refused to perform her part of the contract. However, the pleadings and the contents of the agreement shows that the time of four months

was fixed and no explanation is given by the plaintiff as to why there was such mention in the agreement. In view of these circumstances, for the present matter, it can be said that the time started to run after expiry of four months and the four months need to be counted from the date of agreement.

14) The learned counsel for the appellant submitted that the Courts below have not considered circumstances that there is only oral evidence of plaintiff and there is nothing in rebuttal in respect of the oral evidence. He submitted that when evidence is given that plaintiff had approached Smt. Mathurabai and Mathurabai had given assurance to execute the sale deed, this unrebutted evidence ought to have been considered by the Courts below and it ought to have been held that the remedy was still in existence. This submission is not at all acceptable. When the terms and conditions of the contract were embodied in the document and there was condition like fixing of time of performance, not much importance can be given to the oral evidence of plaintiff though it is unrebutted.

15) The so called legal notice of plaintiff was issued on 23.7.2003 and so, it can be said that the notice was also issued after the expiry of the prescribed period of limitation. It needs to

be mentioned here that the first appellate Court has counted the period from the date of sanction of mutation, though it could have been counted after expiry of four months period fixed in the agreement. Thus, even if the best possible case available to the plaintiff is considered, it can be said that plaintiff filed suit in the year 2004, when the mutation was effected in favour of defendant Nos. 2 and 3 on 11.2.2000.

16) It appears that defendant No. 1 Smt. Mathurabai, the promisor, was not available to file written statement as she died and written statement was filed by her two daughters. This circumstance needs to be considered while considering the contention of the learned counsel for the plaintiff that there is no evidence in rebuttal. As Mathurabi was dead, the document executed by her in the year 1988 is the version of Mathurabai available at present in view of provision of section 32 (3) of the Evidence Act. Fixing of the period was against her interest in view of provisions of Contract Act already quoted.

17) For considering the right of plaintiff to get specific performance of aforesaid contract, it was necessary for plaintiff to satisfy the conditions given in section 16 (c) of the Specific Relief Act. The provision of section 10 (a) (b) and explanation (1)

to this section also needs to be kept in mind as this provision was argued in support of the case of the plaintiff. These provisions run 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)"

The relevant provision of section 16 (c) of the Specific Relief Act is as under :-

"16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a)

(b)

(c) who fails to aver and prove that he has

performed or has always been ready and willing to perform the essential term of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant."

18) The aforesaid provisions of Specific Relief Act show that there is discretionary power to the Court to grant relief of specific performance of contract and in ordinary course, the Court need to grant such relief when the contract involves transfer of immovable property as breach of such contract cannot adequately relieved by compensation in money. For getting this relief, the conditions laid down in section 16 (c) need to be specified by the plaintiff. The provision of section 10 can be used by the Court only after the plaintiff satisfies the conditions given in section 16 (c) of Specific Relief Act, 1963 and the opportunity for satisfying the conditions laid down in section 16 (c) will be available to the plaintiff only if he is able to prove that the suit was filed within limitation. It is needless to observe that law of limitation is prescribed for such cases only in Limitation Act and unless and until the suit is filed within limitation, within the period as mentioned in Article 54 of Limitation Act, there will not be any opportunity for using the provision of section 16 (c) or section 10 of the Specific Relief Act. It is already observed that the provisions of sections 46 and 55 of the Contract Act can

be used for limited purpose, for ascertaining the cause of action. These provisions can be used for giving effect to the provisions of Limitation Act. The provisions of law already discussed and the facts and circumstances of the present case show that the cause of action arose after four months of the date of the agreement and so, the suit filed in the year 2004 was hopelessly time barred. The material available is considered by the first appellate Court and the oral evidence of plaintiff cannot make much difference in that regard.

19) On the point of readiness and willingness, there is no specific pleading in the plaint which is necessary in view of the wording of provision of section 16 (c) of the Specific Relief Act. No date, year are mentioned about the so called steps taken by the plaintiff. The suit was filed after about 15 years of the date of contract when the price of the landed property must have increased many times. Such conduct of the plaintiff needs to be considered while using discretion. Thus, on one hand, she failed to prove that she was ready and willing to perform her part of contract and on that other hand, the aforesaid conduct of the plaintiff needs to be considered against the plaintiff at the time of using discretion given to the Court under section 10 of the Specific Relief Act.

20) The findings of the appellate Court on aforesaid points are the findings on facts. So, this Court holds that there is no point made out for which substantial questions of law can be formulated.

21) The learned counsel for the plaintiff placed reliance on some reported cases like **AIR 2008 SUPREME COURT 1205 [Balasaheb Dayandeo Naik (Dead) Through L.Rs. and Ors. Vs. Appasaheb Dattatraya Pawar, AIR 2012 SUPREME COURT 2035 [Narinderjit Singh Vs. North Estate Promoters Limited], AIR 2000 SUPREME COURT 434 [Velamuri Venkata Sivaprasad (Dead) by LRs. Vs. Kothuri Venkateswarlu (dead) by LRs. and Ors.], AIR 1993 SUPREME COURT 1742 (1) [Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by L.Rs.] and AIR 1999 SUPREME COURT 1441 [Vidhyadhar Vs. Mankikrao and Anr.]**. These cases are on the points like interpreting the stipulations of the agreement to ascertain as to whether the time was essence of contract for section 55 of the Contract Act, the circumstance of escalation of price cannot be ground to deny specific performance of agreement to sell in view of section 20 of Specific Relief Act if there is no pleading of hardship and if it is

not proved that it will be inequitable to order of specific performance of agreement, the scope of second appeal and the point that if inadmissible evidence is considered by the Courts below, substantial question of law can arise on that point and the point that adverse inference which can be drawn against the party who does not enter the witness box. There cannot be dispute over these propositions made in the reported cases. The facts and circumstances of each and every case are always different. Sufficient discussion is made on the points which are involved in the present matter and which are dealt with by the District Court, first appellate Court. There is no scope of interference in the second appeal and there is no material available for formulation of substantial questions of laws.

22) In the result, the appeal stands dismissed. Civil Application is also disposed of.

23) The learned counsel for plaintiff requested for some relief to prevent the defendants from alienating the property, but this relief is refused in view of the facts and circumstances of the case already discussed.

[T.V. NALAWADE, J.]

ssc/