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

FIRST APPEAL NO.1138 OF 2009

1. Smt.Leela Krishnarao Pansare,
Age 68 years, Occu. Agri.,

2. Smt.Ushabai Bapurao Pansare
(deceased) through L.Rs.

2A. Vidya Krishnarao Pansare
Age 49 years, Occu. Household

2B. Mira Dhananjay Watkar,
Age 55 years, Occu. Household

3. Ganesh Krishnarao Pansare,
Age 38 years, Occu. Agri.,

4. Smt.Shantabai Shridhar Pansare,
Age 81 years, Occu. Agri.,

All R/o Takalikadewalit,
Taluka Shrigonda, Dist.Ahmednagar
At present r/o 147, Shaniwar Peth,
Pune 411030 .. Appellants
(Orig.Plaintiffs)

Versus

1. Babasaheb Bhanudas Ithape,
Age 62 years, Occu. Agri.,

2, Ramesh Bhanudas Ithape,
Age 48 years, Occu. Agri.,

3. Pandurang Bhanudas Ithape,
Age 52 years, Occu. Agri.,

All R/o Takalikaldewalit,
Taluka Shrigonda, Dist.Ahmednagar ..Respondents
(Orig.Defendants)

Mr P.R. Katneshwarkar, Advocate for appellants
Mr V.D. Hon, Senior Counsel i/b Mr A.V. Hon, Advocate for respondents 1 to 3

CORAM : N.W. SAMBRE, J.

DATE OF RESERVING THE ORDER : 10th April 2015

DATE OF PRONOUCNING THE ORDER : 5th May 2015

ORDER

1. This appeal is by original plaintiffs questioning the findings of dismissal recorded by the Civil Judge, Senior Division, Shrigonda, District Ahmednagar in Special Civil Suit No.34 of 2007.

2. The present appellants have executed an agreement on 17th August 1995 in favour of the respondents herein for sale of old Gut No.7-D ad measuring 11 hectare 99 R plus 1 hectare 38-R *potkharab* land.

3. It is claimed in the suit that the appellants were residents of Pune and as such, the respondents encroached on their field which has resulted into filing of Regular Civil Suit No.862 of 1991 by plaintiffs No.3 and 4. In the said suit, it appears that an application for temporary injunction was moved by the present appellants which was rejected by High Court on 17th November 1992.

4. The land in question was mutated in the name of present respondents as cultivators in 1991-92.

5. As a consequence of above litigation, it is claimed that the appellants and respondents have entered into compromise resulting into the execution of agreement dated 17th August 1995. In fact, the agreement was entered into between Dattatraya who was title holder to the land in question of which the appellants are his legal

representatives/successors and it was agreed that the land in question will be transferred to the respondents herein for a consideration of Rs.10 lacs and the possession of the suit property was handed over to the respondents upon receipt of Rs.1,00,000/- towards earnest money.

As per the terms of the agreement, it was agreed that out of balance consideration of Rs.9 lacs, Rs.5 lacs will be paid at the time of execution of sale deed whereas Rs.4 lacs by the end of 31st January 1996.

6. The appellant withdrew the RTS Appeal No.93/1996, perhaps pursuant to above referred agreement.

7. The original owner of the land in question expired in 2001 and as such the appellants became owners of the property.

8. The appellants claimed that with an intention to honour the agreement in question, they have demanded the balance amount of consideration Rs.4 lacs which was to be paid by 31st January 1996, however, the respondents have failed to pay the said amount. It is further claimed by them that the respondents had paid amount of Rs.80,000/- and as such, the appellants claimed that out of total consideration of Rs.10 lacs, an amount of Rs.1,80,000/- was paid to them.

9. In the revenue record of the land in question, the same was marked as *Deosthan inam* which entry was agreed to be deleted by the plaintiffs by taking appropriate proceedings before the revenue authorities.

10. It is further claimed by the appellants that as the respondents have failed to pay the consideration amount as agreed to and were trying to grab the property in question, they requested the respondents to hand over the possession of the suit property on 20th March 2007 which was denied by the respondents, resulting into issuance of notice dated 22nd March 2007.

11. The respondents have not honoured the said notice. As such, suit in question came to be filed for cancellation of agreement to sell dated dated 17th August 1995 and for possession of suit property.

12. The claim that was brought into action by the present appellants was resisted by the respondents by filing their written statement Exh.20 admitting the agreement to sell and possession of the respondents. It is also stated by the respondents that Regular Civil Suit No.62 of 1991 was filed by the plaintiffs wherein the application for grant of injunction moved by the present appellants-plaintiffs was rejected resulting into execution of this agreement to sell in question.

13. It is also claimed by the respondents that the entry of *Deosthan inam* in the revenue record which was an illegal entry was required to be deleted by the present appellants and same was condition incorporated into agreement to sell, after deletion of which the sale deed was to be executed. It is claimed by the respondents that they have not committed any breach as they have already paid Rs.4 lacs to the plaintiffs and were ready and willing to perform their part of

contract. As such, it is claimed by the respondents that total Rs.5 lacs was paid to the plaintiffs-appellants herein towards consideration and sought dismissal of the suit.

14. In the light of the pleadings of the parties, the learned trial Court framed issues at Exh.35 and answered the same, as under :

	ISSUES	FINDINGS
1.	Whether the plaintiffs prove that the defendants made a breach of terms and conditions of the agreement to sell dated 17/8/1995 ?	No
2.	Whether the plaintiffs are entitled for the declaration as prayed ?	No
3.	Whether the plaintiffs are entitled for the possession of the suit property as prayed ?	No

15. After framing of the issues, in support of the claim, the plaintiff No.3 Ganesh examined himself at Exh.40 and has produced documentary evidence viz. 7/12 extract, Exh.56, copy of notice issued to plaintiffs, Exh.65, the acknowledgments Exh.66 to 68, Exh.41, agreement to sell, the order passed by the Commissioner dated 4th April 1994 at eXh.51, the consent application by the present defendant No.1 Exh.70, order in RTS Appeal No.93/96 at Exh.71 an

application of defendant No.1 Exh.72 dated 30th August 1991, copy of revision application No.8/1991 at Exh.74.

16. The defendant No.1 examined himself in support of their claim vide affidavit Exh.48 and produced on record the copy of Exh.1 in Special Civil Suit No.50/2008 at Exh.69.

17. Considering the pleadings, issues framed, the learned trial Court upon analysing the evidence has dismissed the suit of the appellants, as such the present appeal questioning the legality and validity of the order dated 6th September 2008 passed by the Civil Judge, Senior Division, Shrigonda in Special Civil Suit No.34/2007.

18. While questioning the legality and validity in the first appeal, Shri Katneshwarkar, learned Counsel for the appellants has invited attention of this Court to the recitals in the agreement dated 17th August 1995 which is Exh.41 and sought to urge that the time was essence of contract. According to him, as the balance consideration was not paid within time as agreed to, that is to say by 31st January 1996, the suit of the appellants should have been decreed. He would urge that the perusal of the evidence of the plaintiff and his cross-examination, if tested in the light of the pleadings of the parties, he would urge that as the payment of balance consideration was not established, the issue should have been framed shifting burden on the defendants to prove the payment of balance consideration, as he has asserted the said fact. In addition to above, according to him, the removal of entry as *Deosthan inam* land though was a condition before execution of the sale deed, however, the respondents –

defendants have objected to the deletion of the said entry. He would further claim that the contract in question was frustrated by the respondents by their own conduct and has sought to place reliance upon Exh.73, i.e. the objection lodged by the various agriculturists to which the respondents were party, thereby objecting the proceedings for deletion of entry of *Deosthan inam*. In support of his contention he has placed reliance upon the judgment of this Court in the matter of **Damodhar Namdeo Sase (deceased, through his legal heirs Smt.Chandrabhagabai w/o Damodhar Sase and ors) Vs. Namdeo Baburao Sase,** reported in **2008 (5) Bom.C.R.627** so as to canvass that in case of recession of contract, the conduct of the defendant is that of default to the agreement of sale, it was always open for the Court to order entitlement of the appellant to rescind the contract under Section 27 of the Specific Relief Act. (hereinafter referred to as "the Act"). In support of his contentions, he has relied upon observations made in paragraph 14 of the said judgment, which read thus :

> "14. Considering the admissions of D.W. Namdeo, it would be amply clear that the contract was frustrated due to his defaults. The deceased plaintiff (Damodhar) was, therefore, entitled to rescind the contract under Section 27 of the Specific Relief Act. The first appellate Court committed patent error while reaching conclusion that the defendant had no obligation at all to secure sale permission. In fact, it was the mutual obligation of both the parties to ensure that sale permission was obtained within a reasonable time frame. The defendant could not have protected specific performance of the agreement on

> his part, without there being serious defaults of the plaintiff. The defendant did not give any notice to deceased plaintiff for showing his bona fides. On the contrary, he avoided to attend the office of the Competent Authority when his presence was required for the transfer in support of the application seeking sale permission. The first appellate Court, patently erred while holding that the condition to obtain sale permission was unilateral obligation of the plaintiff – Damodhar. Though oral obligations could not be impliedly read in the terms of the documents, yet, when the procedural requirement made it obligatory on defendant Namdeo to attend the office of the Competent Authority for recording of his statement, then his failure to comply was germane to frustration of the contract.”

According to him, the conduct of the respondents in objecting the deletion of entry and getting the sale deed executed entitles the present appellants for rescinding the contract under Section 27 of the Act. In addition to above, he has placed reliance upon the judgment of Apex Court in the matter of **Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and ors.,** reported in **AIR 2011 SC 3234** so as to canvass that the time was essence of the contract and non-honouring of the part of the contract by the respondents-defendants would result in cancelling the agreement.

19. Mr Hon, learned Senior Counsel for the respondents-defendants would urge that the suit in question for rescinding the contract under Section 27 of the Act came to be filed at a belated stage i.e. after lapse of 11 years of execution of Exh.41 i.e. agreement dated 17th August 1995. He would urge that it is an admitted fact on record that

the possession of the property in question was handed over at the time of execution of the agreement. He would further urge that the respondents were ready and willing to perform their part of contract and as such, made balance payment of Rs.4 lacs, as was agreed to pay by 31st January 1996. He would further urge that to show their *bona fides* that they were ready and willing to pay the balance consideration to perform his part of contract, he has sought to place reliance upon the judgment delivered by the learned Civil Judge, Senior Division, Shrigonda in Special Civil Suit No.50/2008, which was preferred by his clients for specific performance against the present appellants. He would urge that the balance consideration of Rs.5 lacs was already deposited by them in the said proceedings and their suit for specific performance was dismissed in view of pendency of the present proceedings. According to him, there is presumption that in a sale of immovable property, the time is not essence of contract unless the stipulation in the agreement is so specifically prescribed or provided for. According to him, by not removing the entry of *Deosthan inam*, the appellants themselves have failed to honour their part of contract. According to him, the suit was rightly rejected by the learned trial Court.

20. Upon analysing the issues which are said to be canvassed, in my opinion, following point arises for consideration.

> *In the facts and circumstances of the present case, whether the appellants-plaintiffs were entitled to cancel the contract in question in view of provisions of Section 27 of the Act. ?*

21. So as to appreciate the contentions raised in the plaint and the evidence on record, it is required to be noted that the appellants and the respondents are in agreement that appellants agree to sell 11 hectare 99-R + 1 hectare 38-R *potkharab* land, total 13 hectare 37-R land to the respondents vide agreement to sell dated 17th August 1995. It is also agreed that on the date of said agreement upon receipt of Rs.1 lac towards earnest money, the possession of the land was handed over to the respondents herein. It is also admitted on record that appellants herein filed Regular Civil Suit No.862/1991 in which this Court has rejected the injunction sought by the present appellants by order dated 17th November 1992. It is also not in dispute that on 7/12 extract the names of present respondents are mutated since 1991-92 as cultivators and the Appeal No.63/1993 before the Additional Collector was withdrawn by the present appellants. In the plaint itself the above referred factual matrix was admitted by the appellants and it is also admitted about receipt of Rs.1,80,000/- out of total consideration of Rs.10 lacs. If we consider the recitals in the agreement to sell dated 17th August 1995, which is at Exh.41, it is required to be noted that the parties to the suit have agreed to purchase the property for a consideration of Rs.10 lacs and it is admitted by the plaintiffs that they have received an amount of Rs.1,80,000/- against the same. Upon perusal of the said document, the recitals further provide that the amount of Rs.4 lacs was to be paid by the respondents to the plaintiffs by 31st January 1996 and remaining balance of Rs.5 lacs was to be paid within a period one month upon deletion of entry of *Deosthan inam* from the revenue

record and on vacation of the stay ordered by the Additional Collector. The said agreement also provides that in case the amount agreed is not paid within the time stipulated, the earnest money paid will be forfeited and the appellants will be free to deal with the land in question.

22. In the light of the contents of Exh.41 agreement, if we look into the cross-examination of the present appellants, it is required to be noted that apart from the above referred admitted facts there is admission about receipt of payment of Rs.1,80,000/- by the appellants-landlords. The appellants have denied receipt of Rs.4 lacs by 31st January 1996. It is also admitted by the present appellants that as per the terms of the agreement, the appellants were duty bound to get deleted the entry of *Deostan inam* and to get the stay vacated. The appellants in specific terms admitted the contents of the agreement Exh.41 and further admitted that upon deletion of the entry of *Deosthan inam* and after vacation of interim relief by the Collector within one month, the sale-deed was to be got executed by the defendants. They have admitted that the entry of *Deosthan inam* was neither deleted nor they could specify about the vacation of stay ordered by the Additional Collector. Rather, they have gone on record to say that the deletion of entry about *Deosthan inam* and vacation of stay before the Additional Collector was not required to be carried out in time bound manner in absence of specific stipulation in the agreement. They claimed that the entry *Deosthan inam* was not deleted as the matter is subjudice in the High Court as regards the payment of balance amount of Rs.4 lacs is concerned, though there is

an admission about receipt of Rs.1,80,000/-, however, they have admitted that no separate receipt was passed on after receipt of Rs.1,80,000/- and have also accepted that there is no entry in that regard taken into the accounts.

23. The overall analysis of the evidence of the plaintiffs as they were duty bound to establish that time was essence of contract, if anaylised in the light of the pleadings and the stipulations in the agreement Exh.41, it is required to be noted that the time was not an essence of contract. The same could be further inferred from the fact that the appellants herein have admitted receipt of Rs.80,000/- after execution of the agreement but prior to filing of the suit. They have also admitted that neither there is acknowledgment passed on nor any entry to that effect was taken in the record. They have also admitted about non-removal of *Deosthan inam* entry and absence of knowledge about the vacation of stay by the Additional Collector. The said stipulation if read in the background of the context of Exh.41, the agreement the presumption that time was not the essence of contract and particularly in this case, the time was not essence of the contract, required to be inferred as appellants have failed to demonstrate their case that time was essence of contract. Though Mr Katneshwarkar has sought to place reliance upon the judgment of the Apex Court in the matter of Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and ors. (cited supra), so as to canvass that the time was essence of contract in question and also to state that whether the time was essence of contract could be inferred from the following observations of the Apex Court :

19. The legal position is clear from the decision of a Constitution Bench of this court in Chand Rani v. Kamal Rani MANU/SC/0285/1993 : 1993 (1) SCC 519, wherein this court outlined the principle thus:

" It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

Relying upon the earlier decisions of this court in Gomathinayagam Pillai v. Pallaniswami Nadar MANU/SC/0067/1966 : 1967 (1) SCR 227 and Govind Prasad Chaturvedi v. Hari Dutt Shastri MANU/SC/0010/1977 : 1977 (2) SCC 539, this Court further held that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. Thereafter this court held that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time : (i) from the express terms of the contract; (ii) from the nature of the property and (iii) from the surrounding circumstances as for example, the object of making the contract. The intention to treat time as the essence of the contract may however be evidenced by circumstances which are sufficiently strong to displace the normal presumption that time is not the essence in contract for sale of land. In Chand Rani, clause (1) of the agreement of sale required the balance consideration to be paid as under:

" Rs.98,000/- will be paid by the second party to the first party within a period of ten days only and the balance Rs.50,000 at the time of registration of the sale deed....".

This court held that time regarding payment of Rs.98,000 was the essence, on the following reasoning:

" The analysis of evidence would also point out that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room on the ground floor was given. In cross-examination it was deposed that since income-tax clearance certificate had not been obtained the sum of Rs. 98,000 was not paid. Unless the property was redeemed the payment would not be made. If this was the attitude it is clear that the plaintiff was insisting upon delivery of possession as a condition precedent for making this payment. The income-tax certificate was necessary only for completion of sale. We are unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs. 98,000. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under Clause (1) of the suit agreement."

The intention to make time stipulated for payment of balance consideration will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. If for example, the vendor discloses in the agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need (say medical or educational expenses of a family member) time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract.

24. According to Mr Katneshwarkar, this Court in absence of time being essence of contract cannot lose sight of the fact and infer that the contract has to be performed in reasonable time. He submits that the above referred observations i.e. the express terms of the contract, nature of the property, surrounding circumstances viz. object of making contract and intention to treat time as essence of contract are also required to be taken into account while inferring so. If the above referred observations are applied to the facts of the present case and the evidence brought on record, it is required to be observed that the sale in question was a sale simplicitor and with an intention to invest the said amount in other property or to use the consideration for some purpose which was unavoidable. Furthermore, the conduct of the

appellants for accepting the part payment and acknowledging the same in the evidence, coupled with the fact of filing of suit for specific performance by the respondents vide Special Civil Suit No.50/2008, in which the plaintiffs disputed balance consideration of Rs.5 lacs, the only inference that could be drawn that time was not essence of contract. The observations of the Apex Court in the aforesaid judgment, particularly having regards to the future consideration made in paragraphs 24 and 25 which reads thus -

> 24. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor-Defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market

values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and `non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of

> cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees."

if are taken into account, the fact remains that the respondents have discharged their burden of readiness and willingness by depositing the amount in their suit for performance of contract at their own.

25. In the light of above and furthermore, having regard to the evidence of the appellants and upon analysing evidence of the respondents, in my opinion, the case is sought to be put forth by the appellants for cancellation of contract in question, was not made out and the learned trial Court was right in dismissing the appeal.

26. As such, for the reasons stated herein above, this Court answers the point against the present appellants.

27. First Appeal being devoid of merit, stands dismissed.

(N.W. SAMBRE, J.)

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