

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

SECOND APPEAL NO.174 OF 2014

Gangadhar Rambhau Dhokale,
Age 40 years, Occu.Agriculture,
R/o Jawala, Taluka Parner,
District Ahmednagar
At present R/o Shivshakti Nagar,
Vashi Naka, Mahul road
in front of Railway line, Chembur,
Mumbai

..Appellant
(Orig. Defendant)

Versus

Parubai Banshi Somwanshi,
dead through L.R.
Gajanan s/o Banshi Somwanshi,
Age 44 years, Occu.Agriculture,
R/o Jawala, Taluka Parner,
District Ahmednagar

..Respondent
(Orig. Plaintiff)

Mr V.R.Dhorde, Advocate for appellant
Mr P.R.Katneshwarkar, Advocate h/f Mr Sandip R. Andhale,
Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 21st January 2015

PER COURT

1. This second appeal is by original defendant. The plaintiff – respondent herein filed Regular Civil Suit No.210/1999 on 28th July 1999 for specific performance. It was the case of the plaintiff before the learned trial Court that the suit land bearing Block No.1221, ad-measuring 34-R located at Jawala, Taluka Parner, District Ahmednagar, was transferred to defendant by a registered sale-deed executed on 15th March 1997 for a consideration of Rs.95,000/-. Along with the above referred agricultural land, it was

also declared in the sale-deed that the defendant would be entitled for 1/16th share in the well water. The said document, sale-deed dated 15th March 1997, is exhibited as Exh.32. The plaintiff further claimed that there was another unregistered document of re-conveyance of the land in question by the defendant to the plaintiff executed on the same day with a rider that in a period of 1½ year, the amount of consideration of Rs.95,000/- will be required to be paid back by the plaintiff to the defendant.

2. Having regard to the fact that the defendant failed to re-convey the land or honour the request of the plaintiff for re-conveyancing the land in question, it resulted into filing of Regular Civil Suit No.210 of 1999.

3. The suit was resisted by the defendant - appellant herein by filing written statement at Exh.11. Primarily, the appellant - defendant raised two fold defences, viz. (a) By the sale-deed Exh.32, the land was absolutely vested in the present appellant; and (b) that there was no deed of re-conveyance i.e. Exh.27. It is claimed by the defendant that there are other defences raised, which required clarification under the Specific Relief Act and the Indian Contract Act.

4. Having regard to the pleadings of respective parties, the learned trial Court framed issues at Exh.18 and answered accordingly, which read thus :

ISSUESFINDINGS

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|----|---|--------------------|
| 1. | Does plaintiff prove that there was agreement of re-conveyance of the suit property ? | In the affirmative |
| 2. | Is suit in limitation ? | In the affirmative |
| 3. | Is suit properly described ? | In the affirmative |
| 4. | Is plaintiff entitled for relief sought ? | In the affirmative |
5. In support of the claim put forth in the plaint, the plaintiff – respondent has examined herself and witness Sonyabapu Kondiba Shinde at Exhs.19 and 25, respectively. The defendant examined himself at Exh.30.
6. In addition to above, the documentary evidence in the form of record of rights in relation to suit land Exh.28, the agreement of re-conveyance at Exh.27 and the sale-deed of the suit property Exh.32 were pressed into service.
7. The learned trial Court, having regard to the issues framed and the evidence brought before it, decreed the suit and ordered that it was the defendant – appellant who shall re-convey the suit property in favour of plaintiff – respondent herein by registered sale-deed within a period of three months from the date of the judgment. A rider was incorporated that on failure to do so, the plaintiff – respondent will be at liberty to get the suit land re-conveyanced through the Court for which the plaintiff shall deposit the amount of sale-deed in the Court.

8. The appellant herein, feeling aggrieved thereby preferred Regular Civil Appeal No.54 of 2011 in the Court of District Judge-5, Ahmednagar. The appeal came to be dismissed by judgment and order dated 10th October 2013 and as such present second appeal.

9. Mr Dhorde, learned Counsel for the appellant has strenuously urged that the suit of the plaintiff - respondent was wrongly decreed. According to him, the document Exh.32 is admitted by the parties and had it being case that there was a document Exh.27 of re-conveyance, there would have been a specific mention about the same in the recitals of document Exh.32, i.e. registered sale-deed executed in his favour. He further urged that the document Exh.27 i.e. deed of re-conveyance was not registered and as such, the same raises serious doubt about its execution. He further submits that in absence of examination of the scribe of document Exh.27, the Court ought not to have given finding that the said document was proved. He has further submitted that both the Courts below have recorded perverse findings and drawn incorrect inference based on the pleadings, facts and the evidence.

10. In addition to above, the learned Counsel has urged that even if it is presumed that there exists a document of re-conveyance, the very requirement of Section 16 of the Specific Relief Act, i.e. readiness and willingness of the party seeking specific performance must be established by cogent evidence. According to him, the evidence to that effect brought on record and

the pleadings thereof are hardly sufficient to draw inference that the plaintiff - respondent was ready and willing to perform her part of contract.

11. The next ground sought to be pressed into service by learned Counsel for the appellant is in relation to the time being an essence of contract. According to him, perusal of deed of re-conveyance Exh.27 takes to the only conclusion that the time was an essence of the contract. According to him, the plaintiff was duty bound to refund the amount of consideration within a period of 1½ year from 15th March 1997 - the date of execution of the said re-conveyance deed i.e. on or before 14th September 1998 and as the amount was not refunded, there is no question of the present respondent - plaintiff adhering to the time limit. According to him, the said conduct of the plaintiff - respondent herein dis-entitles her for the relief claimed.

12. In support of his aforesaid contention, learned Counsel Mr Dhorde has relied upon the judgment of the Apex Court in the matter of **Raj Kishore (dead) by L.Rs. Vs. Prem Singh and ors.**, reported in **2011 (3) Mh.L.J.1**, so as to canvass that in a suit for specific performance, the assertion of the party about its readiness and willingness and the evidence in support thereof is material. He also sought to canvass from the said judgment that parties to a transaction executed an agreement of re-conveyance of the property sold, time stipulated for re-conveyance is the

essence of the contract. He has also placed reliance upon the judgment of the Apex Court in the matter of **Umabai and anr., Vs. Nilkanth Dhondiba Chavan (dead) by L.Rs. And anr.**, reported in **2005 (4) Mh.L.J.306**, wherein the entire law as regards requirement of Section 16 of the Specific Relief Act is discussed. According to him, the suit ought not to have been decreed by the Courts below as both the issues i.e. time as essence of contract and readiness and willingness to perform his part of contract should have been answered in his favour. He submits that this Court, having regard to above legal position and contentions based thereon, is required to frame question of law.

13. While countering the above referred submissions, learned Counsel for the respondent – plaintiff Mr Katneshwarkar has invited my attention to explanation to Section 16 (c) of the Specific Relief Act. He submits that the said explanation provides that the averments in the plaint as regards readiness and willingness are sufficient. He further urged that unless directed by the Court, it is not necessary that the amount of consideration should be deposited in the Court. He submits that despite that, in paragraph 2 of the pleadings, by way of abundant precaution, the plaintiff has made a specific averment that if ordered, the plaintiff is ready and willing to deposit the amount of consideration in the Court.

14. In addition to above, Mr Katneshwarkar, learned Counsel for the respondent – plaintiff has invited my attention to the law laid

down by this Court in the matter of **Dagadu Bapu Shinde Vs. Vasant Shankar Nimbalkar**, reported in **1987 (3) Bom.C.R.543** so as to canvass that the requirement of Section 16(c) has to be inferred having regard to the facts of each case. He further submits that only two defences are raised in the written statement i.e. Exh.32 conferring absolute right of ownership in favour of defendant and secondly, the denial of execution of re-conveyance deed Exh.27. No other defence was raised in the written statement. He as such, urged that the appellant – defendant is estopped from raising additional ground in the form of substantial question of law.

15. While responding to the above submissions, the learned Counsel for the appellant has invited attention of this Court to the written statement filed by the appellant – defendant so as to canvass that his contention that the amount of consideration was offered to be deposited in wake of Section 16 (c) of the Specific Relief Act was very much dealt with. As such, appeal is liable to be allowed.

16. Having regard to the rival submissions of the parties, it is to be noted that both the documents at Exh.32 and Exh.27 are of the same date i.e. 15th March 1997. These documents are executed between the appellant and the respondent. While giving finding to the effect that the document Exh.27 was executed between the parties, the Courts below have also referred to the admission given by the present appellant i.e. the worst financial condition of the

appellant which has resulted into execution of the deed Exh.32 so as to satisfy the liability and then in a period of one and half year to reconvey the property. The learned Courts below have read down the said admission given by present appellant in his evidence to his detriment and have reached to a conclusion that the deed in question was very much executed. So far as the contention of the present appellant that the author of the said deed was not examined, in my opinion, the same is not detrimental to the interest of the plaintiff, as she herself had entered into witness box and had also examined one attesting witness to the said document. Once both the witnesses have deposed in favour of the said document, the same was rightly exhibited by the trial Court and the contents thereof were rightly taken to be proved by both the Courts below.

17. So far as the second contention of the present appellant i.e. in relation to the readiness and willingness of the present respondent for performing her part of contract is concerned, learned Counsel was right in pointing out the legal position of law that in case of re-conveyance, the time was an essence of the contract, as is observed by the Apex Court in the matter of Raj Kishore Vs. Prem Singh (cited supra), however, it is required to be taken note of the event that occurred before filing of the suit in question. It is not disputed that the documents Exh.32 and Exh.27 are executed on 15th March 1997. Thereafter, filing of the suit, in the submission of the present respondent, was preceded with the

request on her part along with her witness to the appellant to re-convey the land in her favour. It has also come on record in the evidence of the plaintiff that she had offered the amount to the present appellant - defendant. Though the appellant - defendant had denied the same, the fact remains that the suit had been filed after a period of 1½ year from the period mentioned in Exh.27 agreement of re-conveyance. It is noticed that after about seven months after the request for re-conveyance was made by the plaintiff repeatedly and not honoured by the defendant, the suit was filed which in my opinion, cannot be read to the detriment of the present respondent that she was not ready and willing to perform her part of the contract. In fact, she has shown her *bona fides* by making the statement in the plaint that if ordered, she is ready and willing to deposit the amount of consideration in the Court. The said pleadings are in tune with the provisions of Section 16(c) explanation 1 of the Specific Relief Act. The pleadings to that effect by the plaintiff, particularly in paragraph 2 of the plaint are not specifically dealt with by the appellant - defendant in his written statement. As stated herein above, the appellant - defendant has come out with only two fold defences, i.e. absolute right vested in him by Exh.32 and denial of execution of Exh.27 - agreement of re-conveyance. Further, the plaintiff-respondent herein, in addition to above, has examined one more witness who has stated that the plaintiff had been to his place along with the amount towards consideration to be repaid to the present

appellant. Even plaintiff in her evidence has deposed to that effect and as such, in my opinion, readiness and willingness on behalf of the plaintiff was expressly proved, particularly having regard to the submissions made in the light of Section 16 (c) of the Specific Relief Act.

18. So far as reliance placed by learned Counsel for the appellant, upon the judgment of Apex Court in the matter of Raj Kishore Vs. Prem Singh (cited supra) is concerned, the Apex Court in said case was dealing with the separate eventuality wherein the plaintiff in the suit had not sought specific performance, but had sought amendment to the plaint at an appellate stage. That does not appear to be a case before this Court. As such, in my opinion, the learned Courts below have rightly answered the said issue in favour of plaintiff – respondent herein.

19. So far as the last contention of the present appellant of time being an essence of contract is concerned, though he was right in pointing out that in the case of re-conveyance deed, the time is essence of contract, however, in the present case, the appellant has denied the execution of Exh.27 i.e. agreement of re-conveyance. The appellant has neither raised nor canvassed before the trial Court by way of alternate pleading the said case on the aspects viz. (a) readiness and willingness by the plaintiff on the Exh.27 and (b) that there was no such document Exh.27 executed. It is also required to be taken note of the fact that the present

respondent has filed the suit within a period of about seven months from the date on which the period of 1½ year mentioned in Exh.27 agreement of re-conveyance was to over. In my opinion, the said conduct of respondent-plaintiff, including that of her statement in the evidence that the amount was offered within time to the present appellant, was rightly interpreted by the Courts below to the detriment of the present appellant and to the benefit of the respondent – plaintiff. The reliance placed by the learned Counsel for the appellant in the matter of Umabai Vs. Nilkanth (cited supra), on the point of readiness and willingness is concerned, same is required to be considered in the light of the facts and circumstances of each case, the Court has to reach to a conclusion as to whether there was readiness and willingness and whether the compliance within the time frame was adhered to.

20. Both the Courts having concurrently held that the respondent herein – plaintiff has proved her case, in my opinion, in this case, no substantial question of law is involved, as sought to be canvassed by learned Counsel for the appellant – defendant. As such, the second appeal, which is devoid of merits stands dismissed.

(N.W. SAMBRE, J.)

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