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IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
CIVIL APPELLATE JURISDICTION  
**SECOND APPEAL NO. 297 OF 2015**  
**WITH**  
**CIVIL APPLICATION NO. 664 OF 2015**

Yashwant Rama Sutar  
Since deceased through his heirs and L.R.s  
1a. Smt.Ambubai Yashwant Sutar and others .. Appellants

Vs.

Kerba Rama Shinde and another .. Respondents

Mr.Chetan G.Patil, Advocate for the Appellants.

**CORAM : R. G. KETKAR, J.**  
**DATE : 29<sup>th</sup> APRIL, 2015**

**P.C. :**

. Heard Mr.Chetan G.Patil, learned Counsel for the appellants at length.

2. By this appeal under section 100 of the Code of Civil Procedure, 1908 (fort short 'C.P.C.'), the appellants have challenged the judgment and decree dated 19/09/2008 passed by the learned Civil Judge, Junior Division, Gargoti in Regular Civil Suit No. 68 of 2005 and the judgment and decree dated 06/11/2014 passed by the learned District Judge-2, Kolhapur in Regular Civil Appeal No. 261 of 2008. By these orders, the Courts below dismissed the suit instituted by the appellant, hereinafter referred to as the plaintiff for specific performance of agreement of sale dated 18/05/1984.

3. In support of this appeal, Mr.Patil strenuously contended that respondents, hereinafter referred to as defendants, executed agreement of sale in favour of the original plaintiff- Yashwant Rama Sutar on 18/05/1984. The defendants agreed to sell land admeasuring 0 Hector 23 R out of total area of 4 Hector 21.9 R situate at Mouze- Naganwadi, Tal.Bhudargad, Dist. Kolhapur from Gat No. 61 (for short 'suit land') for a total consideration of Rs.11,500/-. On the same day, defendants put the original plaintiff -Yashwant Rama Sutar in possession of the suit land. He submitted that defendants were to remove/clear the encumbrance on the suit land. The plaintiff repeatedly called upon the defendants to remove/clear the encumbrance and execute the sale deed. However, on one pretext or the other, they avoided to execute the sale deed. He submitted that the Courts below committed serious error in holding that plaintiff was and is not ready and willing to perform his part of contract. Only part which was to be performed by the plaintiff was to pay consideration. The Courts below held that plaintiff had paid entire consideration and no part was left to be performed by him. He, therefore, submitted that the Courts below ought to have held that the plaintiff was and is ready and willing to perform his part of contract.

4. Mr.Patil further submitted that time was not essence of the contract. The plaintiff was put in possession and the said fact is

established from i) recital in the agreement of sale ii) revenue record. The defendants did not enter into witness box and therefore, adverse inference ought to have been drawn against them. He submitted that at the time of institution of suit in the year 2005, entries in the revenue record indicate that plaintiff is in possession. He, therefore, submitted that the Courts below committed error in holding that plaintiff was not in possession of the suit land. In support of his submission, he relied upon the decision of the Karnataka High Court in the case of *Mallappa Vs. Srinivasa Rao*, **AIR 2004 Karnataka 31**.

5. I have considered the submissions advanced by Mr.Patil. I have also perused the material on record. As noted earlier, defendants agreed to sell the suit land to the original plaintiff – Yashwant Rama Sutar for a total consideration of Rs.11,500/-. The recital in the agreement of sale indicates that on the same day, plaintiff had paid entire consideration and that he was put in possession. The agreement of sale further recited that the sale deed was to be executed after removing/clearing encumbrance on the suit land. It appears that defendants had obtained loan from a bank and the said loan was to be repaid by the defendants. After repayment of the loan amount, sale deed was to be executed. The Courts below have considered the evidence on record and found that though plaintiff claims to be in possession of the suit land in pursuance of agreement of sale dated 18/05/1984, the revenue record speaks

otherwise. For the first time in the year 2005-06, name of the plaintiff was entered in the column of “cultivation”.

6. The Courts below, after appreciating the evidence on record, have concurrently found that the plaintiff was not put in possession in pursuance of agreement of sale dated 18/05/1984. In paragraphs 9 & 11, the learned trial Judge observed that the plaintiff did not produce any document to show that he was cultivating the suit land since 1984. It was further observed that the plaintiff had produced 7/12 extracts at Exhibit 6. The name of the plaintiff did not appear in possession column for the years 2001-02 to 2003-04. 7/12 extracts produced at Exhibit 21 show that the name of plaintiff was mutated as cultivator for the year 2005-06.

7. As far as the Appellate Court is concerned, in paragraphs 17 & 18, the learned District Judge observed that as far as the column of cultivation is concerned, name of plaintiff ought to have appeared in 7/12 extracts. 7/12 extracts at Exhibits 6 & 21 for the years 2001 to 2004 & 2005 to 2006 show that names of defendants are appearing in cultivation column and possession column. For the first time, name of plaintiff appeared in cultivation column in 2005-06 and the same was based on order passed by the Tahasildar, Bhudargad in R.T.S./Pikpahani/SR/3/2006. The name of plaintiff appeared only for that year and from the years 2006 onwards, no document is filed by the plaintiff to show that he is in possession of

the suit land. The findings that plaintiff is not in possession of the suit land are based upon appreciation of evidence on record. I, therefore, do not find that the Courts below committed any error in reaching that conclusion. Now, it is, in that context, material to consider the conduct of the plaintiffs.

8. The Courts below found that the plaintiff did not call upon the defendants to repay the entire loan amount and execute the sale deed. Perusal of the evidence of the plaintiff shows that he had orally called upon defendants to repay the entire loan amount and execute the sale deed. However, defendants avoided to execute the sale deed on the pretext that there are some difficulties and they will repay the loan amount. There is no documentary evidence to that effect. For the first time, plaintiff had issued notice on 13/06/2005 and thereafter, the suit is instituted on 21/07/2005. It is in that context, plaintiff ought to have issued notice earlier calling upon defendants to repay the loan amount and execute the sale deed. Perusal of the record shows that after execution of the agreement of sale in the year 1984, plaintiff did not do any over act by calling upon the defendants in writing to repay entire loan amount and execute the sale deed. For the first time, on 13/06/2005, plaintiff had issued notice. This aspect was considered by the Courts below. In paragraph 9, learned trial Judge observed that the recitals in the agreement of sale indicate that sale deed was to be executed after

satisfying the bank loan. If defendants denied to execute the sale deed, the plaintiff was required to get the sale deed executed through Court. The plaintiff has not produced any document on record to indicate that he was cultivating the suit land from 1984. It was further observed that though defendants did not lead any evidence, still notice was issued by plaintiff on 13/06/2005 to the defendants for execution of the sale deed and contention that he waited for the said execution by the defendants was not conceivable and acceptable. As per agreement, plaintiff was required to bear expenses of the sale deed.

9. As far as the Appellate Court is concerned, the learned District Judge has considered this aspect in paragraphs 20 to 22. The learned District Judge considered the decisions in the cases of *Shriram Gangaram Gupta alias Jaiswal Vs. Veekay Builders Associates and others*, **2011(1) Bom.C.R. 771** and *K.S.Vidyanadam Vs. Vairavan*, **1997 (3) S.C.C.1** wherein it is held that even when time is not essence of contract, the plaintiff must perform his part of contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property. The learned District Judge noted that the plaintiff was aware of the encumbrance of the Bhudargad Nagari Sahakari Pat Sanstha. Only by issuing notice to the defendants relating to the transaction of

1984 in the year 2005, it cannot be said that the plaintiff was ready and willing to perform his part of the contract. The plaintiff did not explain as to why he kept mum from 1984 till 2005. The learned District Judge also found that the plaintiff did not produce any document on record to indicate that he was cultivating the suit land.

10. Section 46 of the Indian Contract Act, 1872 lays down that 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 thereto lays down that the question “what is a reasonable time” is, in each particular case, a question of fact. As noted earlier, in the present case, the agreement of sale was executed in the year 1984 and for the first time, plaintiff had issued notice on 13/06/2005. Thus, for a period of 21 years, plaintiff did not do any over act. In other words, in my opinion, plaintiff had abandoned his right to claim relief of specific performance.

11. In the case of *Ankush Bali Sabale & others Vs. Waman Kesu Sabale & another* in **Second Appeal No. 232 of 1981** decided on 24/08/1987, (Coram: R.A.Jahagirdar, J), Bali Sabale – father of the defendants had executed an agreement of sale on 28/08/1950. The total consideration fixed was Rs.600/-. Bali expired on 12/12/1972 leaving behind appellants-defendants as his legal representatives. By notice dated 11/08/1976, respondents-plaintiffs

called upon the defendants to execute the sale deed. As there was no compliance, they instituted suit for specific performance. In paragraph 6, it was observed that one cannot also imagine how after the silver jubilee of the agreement was over, the plaintiffs could come to the Court and ask for specific performance of the agreement of sale at a price which had been fixed at the time of the agreement. This was patently prejudicial to the interest of the defendants. It need not even be alleged or proved. An agreement of this type must be performed within a reasonable time.

12. In the case of *Laxman Kesu Sabale Vs. Waman Kesu Sabale and others* **1995(1) ALL MR 83**, the suit was instituted on 23/10/1981. In that case, plaintiff No.1 had executed sale deed on 16/01/1951 in favour of Kesu Dhondi Sabale, the grandfather of defendants No. 2 to 6 & 8 for a consideration of Rs.700/- and handed over possession of the land along with the sale deed. On the same day, Kesu Dhondi Sabale agreed to reconvey the suit property with possession in favour of plaintiff No.1 for amount of Rs.700/- to be paid by plaintiff No.1. Kesu had two sons Maruti and Laxman. Maruti expired in the year 1961 leaving behind his widow defendant No.1 and his two sons defendants No.2 & 3. Kesu expired in 1963. By notice dated 11/08/1981, plaintiffs called upon defendants to reconvey the property as per the agreement dated 16/01/1951 at Exhibit 41. Since the defendants failed to comply the said notice,

they instituted suit for specific performance of contract.

13. In paragraph 9, the only question that fell for consideration was whether the suit instituted by plaintiffs on 23/10/1981 was within limitation or not. After considering section 46 of the Indian Contract Act 1872, it was observed that plaintiff No.1 had to call upon the defendants to reconvey the property within a reasonable time. In deposition, plaintiff No.1 stated that during the lifetime of Maruti, he had asked Maruti to recover the suit property. Maruti expired in 1961. It was held that the conduct of the plaintiffs in not insisting upon Maruti or his successor to reconvey the suit property as per Exhibit 41 for about 20 years showed that virtually plaintiff had abandoned the claim of reconveyance. Failure on the part of the plaintiffs to press upon the claim of reconveyance till the efflux of 20 years is definitely beyond limitation, unreasonable and therefore, the suit for specific performance, if allowed, the same is bound to result in great prejudice to the defendants. This was a fit case wherein decree of specific performance should be refused, more particularly, under section 20 of the Specific Reliefs Act, 1963.

14. Mr.Patil relied upon the decision of the **Mallappa** (*supra*) to contend that as plaintiffs had paid entire consideration, nothing was left for the plaintiff to be performed. In that case, appellant-plaintiff had instituted suit being O.S.No. 49 of 1978 for

specific performance of agreement of sale dated 31/08/1975. The plaintiff had paid entire consideration amount of Rs.31,001/- and was put in possession. The defendants undertook to execute the sale deed as and when called upon. Based on the agreement of sale, plaintiff had made an application for mutation in his name in the revenue records. By order dated 22/12/1977, the Tahsildar directed the mutation in the name of the plaintiff. During the said proceedings, the defendants contended that the agreement of sale is concocted and denied their liability to execute the sale deed. The defendants also instituted a suit being O.S. No. 408 of 1977 for perpetual injunction against the plaintiff restraining him from interfering with their possession. That suit was dismissed. During the pendency of that suit, present suit was instituted by the plaintiff. The trial Court decreed the suit. The Appellate Court reversed the decree on the ground that plaintiff had failed to aver and prove his readiness and willingness throughout in order to get the relief of specific performance.

15. In paragraph 6 of that report, the High Court found as a matter of fact that plaintiff had paid entire consideration amount and was put in possession of the property. The only legal formality to obtain the registered sale deed was left to be done at a future date and at the choice of the plaintiff. The defendants had agreed to execute the sale deed as and when called upon. The very fact that

the plaintiff is in possession and cultivation of a land as also fact that plaintiff had instituted suit within a period of three years from the date of knowledge of refusal indicated that plaintiff was ready and willing to perform his part of contract. In my opinion, reliance placed by Mr.Patil does not advance the case of the plaintiffs for more than one reason. In the first place, the Courts below found that plaintiff is not in possession of the suit land in pursuance of agreement of sale. Secondly, agreement of sale was executed on 18/05/1984. The plaintiff had issued notice only on 13/06/2005. As against this, in that case, agreement of sale was executed on 31/08/1975 and the suit was instituted some time in the year 1978. In that case, it was also found that plaintiff was in possession and cultivation of the land.

16. In view thereof, I do not find that the Courts below committed any error in holding that plaintiff was not ready and willing to perform his part of contract. No question of law, much less, any substantial question of law arises in this appeal. Hence, appeal fails and the same is dismissed.

17. In view of dismissal of the appeal, Civil Application No. 664 of 2015 does not survive and the same is disposed of accordingly.

**(R. G. KETKAR, J.)**