

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.272 OF 2015
WITH
CIVIL APPLICATION NO.933 OF 2015
IN
FIRST APPEAL NO.272 OF 2015**

Ravindra Madhavrao Gaikwad

...Appellant
(Original Defendant)

Versus

Dharmaraj Dhankdhari Gajbhiye &
Anr.

...Respondents
(Original Plaintiffs)

.....

Mr. Girish K. Vora for the Appellant.

Mr. Sangharaj D. Rupawate with Mr. Santosh J. Parad for
Respondents.

....

CORAM : MRS. MRIDULA BHATKAR, J.

DATE : 26th AUGUST, 2015.

P. C. :

Admit.

2. By consent of the parties, the appeal is called out and
heard finally at the stage of admission itself.

3. This appeal is preferred against the judgment and order dated 5th November, 2014 passed by the learned Civil Judge, Senior Division, Kalyan in Special Civil Suit No.24 of 2011. For short, the parties are hereafter referred to by their original status. The Plaintiffs are husband and wife have filed suit for specific performance of the contract in respect of the suit flat i.e. flat No.401, A-wing, in Om Dattatray Dham Co. Operative Housing Society in village Manda, Titwala (E), Tal. Kalyan, Dist. Thane, admeasuring 630 sq.ft.(built up area) consisting of one bedroom, kitchen, hall, on the 4th floor of the building situated at Survey No.32, Hissa No.2.

4. As per the case of the Plaintiffs, the Defendant i.e. the Appellant, is the owner of the said flat and the Plaintiffs are the purchasers of the said flat. The parties entered into an agreement of sale on 22.3.2010 in respect of the said flat for a consideration of Rs.10,50,000/-. An amount of Rs.2,00,000/- was paid prior to the agreement of sale and an amount of Rs.8,00,000/- was to be paid on or before 20.5.2015 i.e. within 60 days from the date of the agreement. The balance amount of Rs.50,000/- was to be paid at

the time of handing over of the possession. The amount of Rs.8,00,000/- was paid as follows:

- (a) Rs.3,25,240/- paid on 24.6.2010.
- (b) Rs.4,74,760/- paid on 25.9.2010.

After payment of these amounts, when the Plaintiffs approached the Defendant for possession of the flat and offered Rs.50,000/-towards the balance amount of the consideration, the Defendant refused to hand over the possession and did not accept Rs.50,000/-. The Plaintiffs thereafter filed a suit for specific performance. The suit was contested by the Defendant by filing written statement. The issues were framed thereafter. The parties tendered their evidence. Both the parties entered into the box and adduced their evidence through their witnesses. Learned trial Judge after appreciating the evidence, oral as well as the documentary, decreed the suit in favour of the Plaintiffs. Being aggrieved by the said judgment and order dated 5th November, 2014, this appeal is preferred.

5. Learned counsel for the Defendant submitted that the Defendant is justified in not handing over the possession of the flat and cancelling the contract. He submitted that as per the terms of agreement of sale dated 22nd March, 2010, the Plaintiffs were

supposed to pay balance amount of Rs.8,00,000/- within 60 days i.e. on or before 20.5.2010. However, the same was not paid by the Plaintiffs to the Defendant and, therefore, the Defendant is justified in cancelling the said contract. He submitted that the first installment of Rs.2,00,000/- was paid prior to the agreement of sale and second installment of Rs.3,25,240/- was paid after 20.5.2010. He submitted that though one delay was accepted by the Defendant in accepting the payment, it does not mean that delay in further payment would also be condoned and the money was acceptable.

6. The learned counsel for the Defendant further submitted that the Defendant did not accept the second installment of Rs.4,74,760/- but it was deposited by the Plaintiffs without knowledge of the Defendant in his account and the Defendant had knowledge of the said credit of money on 25.9.2010. He submitted that the Plaintiffs did not perform their part of making payment in time as scheduled and agreed, in the agreement of sale. The Defendant is justified in cancelling the agreement for not performing the contract. He further submitted that learned trial Judge has committed error by not taking into account the default

committed by the Plaintiffs in payment and learned Judge ought not have decreed the suit in favour of the Plaintiffs. In support of his statement, he relied on the admission sought by the Defendant in the cross examination of the Plaintiffs, where he has admitted that it is true to say that it was settled between them to complete the transaction within a period of sixty days and therefore, judgment and order dated 5th November, 2014 is to be set aside. He further submitted that the Defendant is ready to deposit entire amount, which is accepted from the Plaintiffs.

7. Learned counsel for the Plaintiffs, while opposing the appeal, relied on the evidence of examination-in-chief of the Plaintiffs and also the averments made in the plaint. He submitted that the entire amount of Rs.10,00,000/- is paid and the Plaintiffs are ready to pay the balance amount of Rs.50,000/- as it was agreed to be paid at the time of handing over the possession. Learned counsel further submitted that the flat was mortgaged by the Defendant with the H.D.F.C. Bank and he was required to pay the loan taken from H.D.F.C. Bank. It was agreed between the parties that said loan was to be paid after the payment made by the

Plaintiffs after raising loan. He submitted that accordingly, the Plaintiffs have raised the loan from Diwan Housing Finance of Rs.8,50,000/- and thereafter the payment was made in two installments directly by Diwan Housing Finance in the account of the Defendant in H.D.F.C. Bank, so that he could pay for the said loan. Learned counsel further submitted that a cheque of Rs.3,25,240/- was issued by Diwan Housing Finance to H.D.F.C. Bank and the other cheque was directly deposited by the Plaintiffs in the account of the Defendant. Both the cheques were credited by the Defendant. He submitted that as on today, the Plaintiffs are paying E.M.I. of Rs. 12,000/- of the loan amount of Rs.8,50,000/- and it is deducted from his salary towards the loan that he has taken for purchasing the said flat. The Plaintiffs want possession of the flat and he supported the judgment passed by the trial court. The Point of determination is that whether the learned Judge has committed error in decreeing the suit.

8. I have perused the entire evidence, which is produced by the learned counsel for the Defendant. Similarly, agreement of sale dated 22nd March, 2010 and affidavit of payment of

Rs.10,00,000/- towards the consideration are not disputed. It appears from the submissions of learned counsel for the Defendant and also from the Plaintiffs that the only issue, on which the entire defence of the Defendant is based, is that the payment of second installment of Rs.4,74,760/- was delayed as it was not paid within a stipulated time i.e. on or before 20.5.2010. Besides this, there is no other ground for the Defendant to say that the Plaintiffs were not ready and willing to perform their part of the contract. It is to be noted that though it was agreed between the parties that the balance transaction was to get over within a period of 60 days from the date of the agreement of sale and thus, the entire payment was to be made on or before 20.5.2010, payment of Rs.8,00,000/- was not paid within that time. However, the fact that the Defendant accepted part payment of Rs.3,25,240/- on 24.6.2010 i.e. after 20.5.2010, goes against the Defendant and it demolishes the case of the Defendant on the ground that time was the essence of the contract. The act of acceptance of this amount after the stipulated date shows that the Defendant was ready to accept such delayed payment. Submissions of learned counsel that only one delay was condoned and the Defendant was not ready to condone further

delay hold no substance. Thereafter second payment of Rs.4,74,760/- was made on 25.9.2010. It is submitted by learned counsel for the Plaintiffs that on 8.7.2010, title deeds of the flat were handed over by the H.D.F.C. Bank to the Defendant and thereafter it was possible for the Plaintiffs to raise loan from the finance company. The Plaintiffs made payment after raising loan.

9. Considering this evidence, I am of the view that the reasoning given by the learned trial Judge in adjudicating the matter is correct and legal. I do not find any flaw or illegality in the said findings. The suit is rightly decreed and the impugned order is maintained. The Appeal is dismissed.

10. Learned counsel for the Defendant submits that he wants to challenge the order and therefore, seeks that the stay which was granted pending admission be continued for eight weeks. Learned counsel for the Plaintiffs opposes the prayer. However, in the circumstances of the case, stay is extended for a period of six weeks from today.

11. In view of the dismissal of the First Appeal No.272 of 2015, Civil Application No.933 of 2015 does not survive and hence, the same is disposed of.

(MRS. MRIDULA BHATKAR, J.)