

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

**Second Appeal No. 314 of 2016
With
Civil Application No.5702 of 2016**

Chandanmal Chunilal Oswal
Since deceased through legal heirs
Nirmalabai Chandanmal Oswal
And Others.

.. Appellants.

Versus

Ravindra Govardhandas Disa
Since deceased through legal
representatives
Asha Ravindra Disa & Others.

.. Respondents.

Shri. B.R. Waramaa, Advocate, for appellants.

Smt. C.S. Deshmukh, Advocate, for respondent Nos.1 to 11.

Shri. Y.G. Gujarathi, Advocate, for respondent Nos.12 & 13.

CORAM: T.V. NALAWADE, J.

DATE : 19th JULY 2016

ORDER:

1) The appeal is filed to challenge the judgment and decree of Special Civil Suit No.8/1991 which was pending in the Court of the Civil Judge, Senior Division, Dhule and also to challenge the judgment and decree of

Regular Civil Appeal No.33/2013 which was pending in the District Court Dhule. The suit filed by the appellants for relief of specific performance of contract of sale of immovable property is dismissed by the Courts below and the counter claim filed by the defendants for recovery of possession is decreed in their favour. However, decree is given in favour of the plaintiffs, appellants and they are entitled to get back the earnest money paid by them along with interest at the rate of 9% per annum. Both the sides are heard.

2) The suit was filed in respect of house bearing CTS No.1440 admeasuring 165.5 square meters situated within limits of Dhule Municipal Council. There was construction on this property and the defendant Nos.1 to 12 were owners of the property at the relevant time.

3) It is the case of the plaintiffs that they are in possession of northern portion of the suit property and they had taken possession as lessee. It is the case of the plaintiffs that most of the defendants were living at different stations and they were not turning up to the

property and they were not getting any income from the property and so they decided to sell the suit property. It is contended that for the plaintiffs, plaintiff No.1 negotiated the terms and conditions of the contract of sale with defendant No.1, who was representing the remaining defendants. It is contended that the defendants agreed to sell the property to plaintiff Nos.2 and 3 for consideration of Rs. one lakh. It is contended that the amount was to be paid in installments and the defendants were to hand over possession of the portion which was with them and also some portion which was in possession of some tenants like U.R. Kulkarni and Lakhmichand Lalji Shah. It is the case of the plaintiff that the possession was to be handed over to the plaintiffs prior to making of payment of third installment. It is the case of the plaintiffs that they continued their possession of the portion which was with them as lessee under the contract of sale, as prospective purchasers.

4) It is the case of the plaintiffs that on the date of the agreement they paid Rs.25,000/- as earnest money. It is contended that the defendants were not able to hand

over the possession of the aforesaid portion which was with Kulkarni and Shah after making payment of 2nd installment. It is contended that as the defendants were not in a position to give possession of the portion which was with a tenant, amount of Rs.5000/- was to be reduced from the aforesaid total consideration. This was in respect of possession of Shah.

5) It is the case of the plaintiffs that they were always ready and willing to perform their part of contract. The plaintiffs contended that even when defendants were not in a position to hand over the possession of the portion which was with the tenants like Kulkarni, they were ready to purchase the property. It is contended that the possession of the portion which was with defendant No.12 was also not given by giving lame excuses. It appears that the defendant No.13, husband of defendant No.12, was added in the suit subsequently and some allegations are made against him.

6) It is the case of the plaintiffs that they had sent letters to defendant No.1 on 26-7-1978, 25-7-1979, 28-6-

1980 and 18-7-1980. It is contended that they had requested the defendants to complete the transaction by handing over the possession of aforesaid portions. It is contended that the defendants then sent notice through Advocate to the plaintiffs on 9-12-1987 and plaintiffs were asked to give possession of the portion which was with them. It is contended that this notice was replied by the plaintiffs on 15-3-1988 and cause of action took place when the notice was received by the plaintiffs. It is contended that as the market price of the property has increased many times and it was more than Rs. seven lakh on the date of the suit, the defendants were not ready to execute the sale deed. It appears that one notice dated 9-12-1987 was issued for the defendants and it was served on the plaintiffs on 16-1-1988 and in this notice the plaintiffs were asked to hand over possession. The suit was filed in the year 1991. The suit property is shown to be sold to defendant Nos.12 and 13 by other defendants.

7) Defendant No.12 filed written statement and she has also filed counter claim. She is sister of defendant No.1. She denied that defendant Nos.2 to 12 had given

power of attorney to defendant No.1 and by using that power of attorney defendant No.1 had agreed to sell the property to plaintiff Nos.2 and 3. She denied that the plaintiffs were in possession of some portion as tenants prior to the so called agreement. It is her case that right from beginning defendant No.12 is living in the suit property and on the date of suit also she was there and this fact is within the knowledge of the plaintiffs.

8) It is the case of defendant No.12 that in the year 1978 value of the wooden doors and wooden fixtures of the structure was more than Rs.2.5 to 3 lakh and so it is not probable that the defendants had agreed to sell the suit property for consideration of Rs. one lakh. She denied that there was such agreement and earnest money was obtained from the plaintiffs. She denied the contentions made with regard to terms and conditions of the agreement of sale. She denied that the letters were sent by the plaintiffs in which they had asked to complete the sale transaction.

9) Defendant No.12 contended that the suit is not within limitation. She denied that cause of action took place when plaintiffs received legal notice sent by the defendants for asking the plaintiffs to hand over the possession.

10) It is the case of the defendant No.12 that plaintiff No.1 and defendant No.6 had started business in partnership in the portion which is with the plaintiffs. It is contended that their partnership came to be dissolved in the year 1978. It is contended that the possession of the firm was only due to the partnership with defendant No.6 and after the dissolution neither the plaintiff nor the dissolved firm had right to keep possession. It is contended that the portion was not returned back by the plaintiffs. It is contended that they had started another business in new shop but they avoided to return back possession. The defendant contended that by giving notice of termination of licence possession was demanded and this notice cannot be treated as cause of action for the suit of specific performance. By making such contentions counter claim was made for getting possession of the

portion which is with the plaintiffs.

11) Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. The trial Court held that the plaintiffs had proved that there was agreement made by defendant No.1 and it was for all the defendants. The trial Court held that plaintiffs failed to prove that they were ready and willing to perform their part of contract. The trial Court further held that suit was not within limitation. The trial Court gave finding that the plaintiffs were not tenant in respect of portion which was in their possession. It is held that it is permissive possession, possession of licensee. The counter claim was decreed by the trial Court and the District Court has confirmed these findings.

12) The defendants have not challenged the finding that there was agreement of sale. The other finding that the plaintiffs are entitled to get back the earnest money along with interest is also not challenged in the present matter though first appeal was filed to challenge those findings. In view of these circumstances the only point

which remains for consideration in the present matter is whether the plaintiffs were ready and willing to perform their part of the contract and whether the suit was within limitation. In view of nature of the pleadings that they are in possession as prospective purchasers, the case in respect of lease need not be considered in detail. The record which includes the record of partnership shows that defendant No.6 was the partner and he had particular share in the profits and that was due to his investment like allowing to use the property for running the business. Admittedly this partnership was dissolved. In view of these circumstances, there is no need to discuss the case of the plaintiffs of the possession as lessee, tenant.

13) Plaintiff No.1 is father of plaintiff Nos.2 and 3 and the so called agreement was signed by defendant No.1. Plaintiff No.1 was partner in the aforesaid firm. Plaintiff No.1 has not stepped in witness box and one Sharad, son of plaintiff No.1 has given evidence. Plaintiff No.3 is also examined as witness. Some technical point was raised due to non examination of the plaintiff No.1 in the suit but as the agreement was made in favour of

plaintiff Nos.2 and 3, this point need not be considered again. The evidence of Sharad and plaintiff No.3 is as per the aforesaid pleadings in the plaint. The Courts below have held that plaintiffs have failed to prove that they had complied with terms and conditions of the agreement of sale. It is held that they have failed to prove that they were not to make payment till possession was handed over as per their case and substantive evidence given. As the specific time was fixed for completion of the transaction the Courts below have held that the cause of action took place when the time fixed expired. It is also held that the plaintiffs knew that the defendants were not ready to execute the sale deed.

14) Exhibit 275, agreement, shows that it was executed on 26-7-1978. In clause (3) of the agreement, the time and the mode of payment, installment, is mentioned. Installments were to paid as under :

(I) First installment on the date of execution of the document. It is proved by the plaintiffs that this amount of Rs.25000 was given.

(II) The second installment was to be given within six months from the date of execution of the agreement, before end of January 1979 and the Courts below have held that this second installment was also paid.

(III) The third installment was to be given within six months from the date of the second installment, before the end of July 1979; and,

(IV) The fourth installment was to be given at the time of execution of the sale deed.

15) Admittedly, the last two installments were not paid or tendered by the plaintiffs. The terms and conditions mentioned in 4th clause of the agreement show that on or before 31st March 1979 the possession of the portion which was with the vendor was to be given. On the basis of this clause, much was argued and it was submitted that as the possession was not given, subsequent installments were not paid. The terms and conditions mentioned in clause (5) of the agreement shows that possession of the rest of the portion except the portion occupied by two tenants like Bhogilal Vora and Sukanmal Sindhi was to be given at the time of execution of sale deed. Thus the purchasers were not expecting the

owner to hand over the portion which was with the tenant. Clause (6) of the agreement shows that possession of portion which was with third tenant, Lakhmichand Lalji Shah, was not to be given and for that consideration was to be reduced by Rs.5,000/-. Thus, at least amount of Rs.45,000/- was to be paid by the plaintiffs for completing the transaction. Clause (7) of the agreement shows that the sale deed was to be executed and transaction was to be completed on or before 31st January 1980. Clause (10) of the agreement runs as under :-

"(10) The term of payments as per clause (3) above is the essence of the agreement and this agreement shall be liable to be cancelled if purchasers commit any breach of the same."

16) The aforesaid clauses show that time of payment was fixed but the plaintiffs did not pay the third installment and they put some conditions which were not tenable. The pleadings already quoted show that it was inconsistent with the contents of the agreement as names of different tenants are mentioned in the pleadings. It can be said that first time in the pleadings the plaintiffs

contended that they were ready and willing to purchase the property even when the tenants were still there and owner was not in a position to hand over the possession of those portions. This willingness has no meaning in view of the aforesaid terms and conditions of the agreement of contract and the circumstance that this willingness was shown in the year 1991 in the suit and not in the past.

17) The plaintiffs have relied on the documents at Exhibits 276 and 277, so called letters sent to the defendant No.1 to ask him to complete the transaction. The Courts below have held that these letters were sent. Even if this case is accepted as it is that cannot make much difference on the merits of the case. In these letters condition was put by the plaintiffs that possession was to be given first and then they were to pay the third installment. These circumstances show that plaintiffs were not ready and willing to pay remaining amount of consideration. The last date for making payment was 31-1-1980 and the record shows that after July 1980 the plaintiff did not keep contact with the defendants and they never showed readiness and willingness, though in the

past they were trying to create record and it can be said that there is no record whatsoever in their favour post July 1980. Defendant No.12 was living there and in view of the facts and circumstances, the Courts below have held that the plaintiffs knew that the defendants were not ready and willing to execute the sale deed. Thus, the cause of action took place on 31-1-1980, the last date fixed for completion of the transaction.

18) From the evidence given and the circumstances it can be said that it is the owner, defendants, who took first step by sending legal notice. This notice was received in January 1988 but the reply was given on 15-3-1988. The suit came to be filed on 5-12-1990. These circumstances are against the plaintiffs. They indicate that as they were in possession, they were not paying anything, they wanted to protract the things.

19) The last date of making payment of the consideration was 31-1-1980 and in view of the circumstances, the Courts below held that the cause of action took place on the next date of the last date. Even

prior to that date there was refusal on the part of the defendants to execute sale deed. Thus, suit was not filed within 3 years from the date of cause of action, the suit was not filed within limitation. From the aforesaid facts and circumstances only inference was possible that the plaintiffs were not ready and willing to perform their part of the contract even during period fixed for completion of transaction.

20) Learned counsel for the appellants placed reliance on some reported cases. In the case reported as **2006(5) Mh.L.J. 209 (Panchanan Dhara v. Monmatha Nath Maity)** the Apex Court has discussed the provisions of sections 16(c) and 20 of the Specific Relief Act and Article 54 of the Limitation Act. It is laid down that in view of the wording of Article 54 limitation starts when plaintiff got notice that performance had been refused. Facts and circumstances of each and every case are always different. When time limit is fixed for performance of the promise limitation starts after expiry of the said time fixed for performance.

21) In the case reported as **AIR 1977 SC 1005 (Govind Prasad Chaturvedi v. Hari Dutt Shastri)** the time was not the essence of contract and so the case of the plaintiff of his readiness and willingness was considered for consideration of his defence available under section 53A of the Transfer of Property Act. In this case the Apex Court has considered provision of Section 55 of Contract Act and it is observed that unless there is stipulation as to time essence of contract, normally presumption is that in the contract of sale of land, stipulation as to time is not the essence of the contract.

22) In **AIR 1970 SC 546 (Nathulal v. Phoolchand)** when something was required to be done by the vendor it was held that such obstacle in the contract needs to be removed by the vendor. Permission of some authority was required to be taken in that proceeding. There cannot be any dispute over the proposition.

23) Learned counsel for the appellants placed reliance on a case reported as **AIR 2013 SC 434 (Satya Jain v. Anis Ahmed Rushdie)** and submitted that most of

the defendants were out of station and so the plaintiffs could not show readiness and willingness. This submission is not at all acceptable in view of the aforesaid facts and circumstances. Defendant No.12 has been living in some portion of the property and there was no hindrance to file suit if they were ready and willing.

24) The facts of the case reported as **2006(3) Mh.L.J. 1 (R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy)** were totally different.

25) In the case reported as **2007(3) Mh.L.J. 480 (Agya Rani Dua v. Vidyagauri J. Tripathi)** when agreement was not terminated it was held that second part of Article 54 of the Limitation Act was applicable and it was open to the purchaser to presume that the agreement was subsisting. The facts were totally different.

26) In the case reported as **AIR 1999 SC 3804 (M/s Arosan Enterprises Ltd. v. Union of India)** the Apex Court has laid down that Court cannot fix date on its own for performance of contract. There cannot be dispute over

this proposition. Courts are expected only to interpret terms and conditions of agreement. Concurrent findings are recorded by the Courts below on this point and this Court sees no reason to interfere in those findings. The findings are questions of fact and no substantial question of law as such is involved in the matter. In the result, the appeal is dismissed. Civil Application stands disposed of. Time of six weeks is given to challenge the decision of this Court.

Sd/-
(T.V. NALAWADE, J.)

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