

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

**Second Appeal No.361 of 2016
With
Civil Application No.8196 of 2016**

Krushnadas Motilal Wani
(Deceased) through legal
representatives.

.. Appellants.

Versus

Vaishali Vidhyadhar Marathe.

.. Respondent.

Shri. P.B. Pawar, Advocate, holding for Shri. D.M. Pingale,
for appellants.

CORAM: T.V. NALAWADE, J.

DATE : 9th JUNE 2016.

ORDER:

1) The appeal is filed to challenge the judgment and decree of Special Civil Suit No.64 of 1991 which was pending in the Court of the Civil Judge, Senior Division, Nandurbar and also to challenge the judgment and decree of Regular Civil Appeal No.27 of 2012 which was pending in the Court of the District Judge-1 Nandurbar. The suit was filed for relief of specific performance of agreement of sale dated 15-12-1990 by the present respondent and

the suit is decreed in favour of the plaintiff by the trial Court. Concurrent findings are there on all points. Heard learned counsel for the appellant.

2) The suit was filed in respect of house property bearing CTS No.683/2 situated at Nandurbar. The property belongs to the defendant and it is contended that under the agreement of sale dated 15-12-1990 the defendant agreed to sell the suit property to the plaintiff for consideration of Rs.88,001/-. It is contended that on the date of the agreement, plaintiff paid earnest money of Rs.11,001/- to the defendant. It is contended that the transaction was to be completed before 31-3-1991 and at the time of registration of sale deed remaining amount of Rs.77,001/- was to be paid. It is contended that in case of failure to pay the amount before the date, interest at the rate of 12% per annum was to be paid by the plaintiff to the defendant and at the time of sale deed possession was to be given to the plaintiff of the portion which was in actual possession of the defendant.

3) It is the case of the plaintiff that on 25-3-1991 her husband personally met the defendant and requested him to complete the transaction by accepting the remaining amount of Rs.77,001/-. It is contended that by giving some excuses the defendant avoided to execute the sale deed. It is contended that the husband of the plaintiff met the defendant 3 to 4 times prior to 31-3-1991 but on every occasion it was told that the defendant had gone out of station. It is contended that ultimately letter was sent on 25-3-1991 to request the defendant to complete the transaction. It is contended that one letter was sent by registered post and its copy was sent under certificate of posting. It is contended that in spite of sending such letters the defendant did not execute the sale deed and so the suit was required to be filed. It is the case of the plaintiff that she was always ready and willing to perform her part of the contract but the defendant avoided to execute the sale deed.

4) The defendant contested the matter by filing written statement. He admitted that there was agreement of sale of the suit property. He contended that the plaintiff

could not collect the balance consideration in the fixed time and so committed breach of the contract. It is contended by the defendant that time was the essence of contract. It was also contended that the plaintiff was not ready and willing to perform her part of the contract. He contended that he forfeited the earnest money of Rs.11,001/- paid by the plaintiff.

5) Issues were framed by the trial Court on the basis of the aforesaid pleadings. The plaintiff examined her husband. The defendant gave evidence in rebuttal.

6) The agreement is at Exhibit 40 and the contents of the agreement are not disputed by both the sides. The possession was not given and on the date of the transaction earnest money of Rs.11,001/- was paid. Though the plaintiff was expected to pay remaining amount of Rs.77,001/- on or before 31-3-1991, in case of failure to make payment before that date, the plaintiff was to pay interest at the rate of 12% per annum till the date of execution of sale deed. Only after making payment of remaining consideration with interest the sale deed was to

be executed by the defendant. Thus there was no mention that the agreement was to be treated as cancelled in case of failure to make payment of remaining consideration before the fixed date. In view of these circumstances the provision of Section 55 of the Indian Contract Act, 1872 needs to be used which runs as under :-

"55. Effect of failure to perform at fixed time, in contract in which time is essential.-- When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.-- If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.-- If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

7) It can be said that time was not the essence of the contract in the present matter. Further, evidence is given by the husband of the plaintiff that many attempts were made to make payment of remaining amount and get sale deed executed. In addition to the oral evidence, record is produced like copy of letter dated 24-3-1991 at Exhibit 44 and certificate of posting at Exhibit 43. Registered envelope is at Exhibit 42. The registered envelope was returned as un-served but there is record of sending copy under certificate of posting. The correspondence was made on correct address mentioned in the documents and in view of this circumstance the Courts below have held that the service of the letters can be presumed. Reliance was placed on the case reported as **1990 Mh.L.J. 79 (Amrutlal v. Wishwanath)**. This Court has observed that in such cases the presumption available under section 114 of the Evidence Act can be used. In the present matter learned counsel for the original defendant, appellant placed reliance on a case reported as **2005 (6) Bom. C.R. 102 (Dhruvakumar v. Dattatraya)**. In this reported case when the Court found that service under certificate of posting was doubtful, it was held that

service of notice of termination of tenancy under Rent Control Act was not proved. Thus the purpose behind said notice was different and the facts were also different. This Court holds that the observations made by this Court in the case cited by the appellant are not of any help in the present matter.

8) The learned counsel for the appellant placed reliance on another case reported as **2011 (2) Mh.L.J. 436 (Man Kaur v. Hartar Singh)**. It was submitted that it was necessary for the plaintiff to step into witness box and as she did not step into the witness box it cannot be said that the plaintiff has proved readiness and willingness. The facts of that case were different and in that case holder of power of attorney was examined and the power of attorney had no personal knowledge regarding the transaction. The facts of the present case show that the husband of the plaintiff has given evidence and his evidence shows that he has personal knowledge regarding the transaction and also the correspondence made. He has given evidence that he himself made attempt to give the remaining amount of consideration to the defendant to

complete the transaction and that was done for the plaintiff. This witness is believed by the Courts below and the finding is given that the plaintiff was willing to perform her part o the contract.

9) The material on the record shows that steps were taken by the plaintiff before the fixed date to make payment of remaining consideration though time was not the essence of contract. Possession was not given to the plaintiff and she had parted with part of the consideration already. The suit was also filed immediately in the year 1991. These circumstances are sufficient to prove that the plaintiff was ready and willing to perform he part of the contract. Copy of the bank account was produced to show that plaintiff was having money to make payment of remaining consideration at the relevant time. Thus there was readiness and the record is sufficient to prove that there was willingness. The findings given by the Courts below are findings of fact and this Court holds that no substantial question of law as such involved in the matter.

10) In the result, the appeal stands dismissed. Civil application is disposed of.

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

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