

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 10536 OF 2015

Mushtaq Mahibub Shaikh

...Petitioner

Versus

Vijay Mahadev Suryawanshi and Ors

...Respondents

....

Mr. Milind Deshmukh, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 20th APRIL, 2016

P.C.

1. Heard Mr. Milind Deshmukh, learned Counsel for the petitioner, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 28.8.2015 passed by learned District Judge-3, Satara in Misc. Civil Appeal No.115/2015. By that order, learned District Judge allowed the appeal preferred by the original defendants and quashed and set aside the judgment and order dated 2.5.2015 passed by the learned Civil Judge, Junior Division, Phaltan below Exhibit-5 in R.C.S. No.13/2015. Learned District

Judge accepted the undertaking of the defendants that they will not object specific performance of the contract in the event of the petitioner, hereinafter referred to as 'plaintiff', succeeding in the suit for specific performance on the ground that they made construction by spending huge amounts and if ordered they will remove the construction which is subject matter of Visar Pavati dated 16.8.1999.

3. Mr. Deshmukh submitted that after considering the material on record, the learned trial Judge held that the plaintiff has made out *prima facie* case and the balance of convenience lies in his favour. The plaintiff will suffer irreparable loss and hardship if temporary injunction is not granted in his favour. He submitted that on 16.8.1999 defendant No.1 after accepting Rs.80,000/- executed earnest receipt in the presence of witnesses. Defendant No.1 agreed to get his share partitioned and thereafter execute sale deed by accepting the balance consideration. The plaintiff was and is all along ready and willing to perform his part of the contract. He submitted that if the defendants proceed with the construction over the suit property, it will frustrate the claim of specific performance made by the plaintiff in the suit. As against this, learned District

Judge committed serious error in interfering the discretionary order passed by the learned trial Court.

4. I have considered the submissions advanced by Mr. Deshmukh. I have also perused the material on record. As noted earlier, the plaintiff has instituted the suit for specific performance of the document dated 16.8.1999 which is styled as 'Visar Pavati'. Learned District Judge has observed in paragraph-6 that there is no material on record to indicate what steps the plaintiff has taken after execution of Visar Pavati on 16.8.1999. For the first time, the plaintiff issued notice dated 23.1.2012. Learned District Judge also noted that the suit was instituted only after the defendants demolished the old house and commenced new construction. There is no explanation as to why the plaintiff did not file suit within a reasonable period from the date of execution of the Visar Pavati. Section 46 of the Indian Contract Act, 1872 reads thus :

“46. Time for performance of promise, where no application is to be made and no time is specified. – 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.—The question "what is a reasonable time" is, in each particular case, a question of fact."

5. *Prima facie*, there is no material on record to show that what steps the plaintiff has taken after execution of visar pavati on 16.8.1999. It is only after the defendants demolished the old house and started construction of new house, the plaintiff has instituted the suit. In view thereof, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India, more so when the learned District Judge has protected the interest of the plaintiff after accepting the undertaking in terms of clause-3 of the operative part of the impugned order. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)