

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

BENCH AT AURANGABAD.

SECOND APPEAL NO.494 OF 2017

Kailashbhai S/o Mohanlal Joshi,
Age 70 years, Occ.Business,
R/o Aandhle Chaure Nagar,
Nagapur, Ahmednagar,
Dist.Ahmednagar.

... Appellant.
(Orig.Defendant)

Versus

Sunita W/o Vijay Nandurkar,
Age 40 years, Occ.household,
R/o Bisht Bag Naka, Pipeline
road, Ahmednagar, Dist.
Ahmednagar.

... Respondents.
(Orig.plaintiff)

...
Mr.Pawan K.Lakhotiya, advocate holding for
Mr.S.S.Panale, advocate for the appellant.
Mr.V.D.Sapkal, advocate for Respondent
...

CORAM : N.W.SAMBRE, J.

Date : 28.07.2017.

PER COURT :

1. Heard.

2. The Respondent-plaintiff filed Special

Civil Suit No.180/2006 for declaration, perpetual injunction and possession. The plaintiff claimed to be owner of suit property which was transferred in favour of defendant present appellant vide sale deed Exh.73 executed on 17.2.2006. The sale was executed after having accepted post dated cheques.

3. The said cheques since were dishonoured, the present appellant-original defendant was convicted for an offence punishable U/s 138 of the Negotiable Instruments Act. The appellant-defendant had undergone the sentence, however, has not paid the compensation and fine.

4. The suit of the present Respondent came to be dismissed wherein prayer for injunction, declaration and possession is made based on non-payment of entire consideration. The learned trial Court held that the Respondent-plaintiff is entitled to recover the balance consideration from the appellant and as such the suit was dismissed.

5. In appeal being RCA No.114/2016, the

learned District Judge-2, Ahmednagar, allowed the same vide judgment and decree dated May 23, 2017 directing the present appellant to handover possession of the suit property within a period of three months from the date of decree and the Respondent was directed to refund earnest amount of Rs.11,25,551/- (Rupees eleven lacs twenty five thousand five hundred fifty one). It is also declared by appellate Court that the sale deed dated 17.2.2006 is cancelled for non-compliance of the terms and conditions of the sale deed. As such this Second Appeal.

6. The learned counsel for the appellant would invite my attention to the recitals in sale deed Exh.73, so as to canvass that the intention of the parties to the sale deed is to absolutely transfer the title of the suit property in favour of appellant irrespective of the receipt of entire consideration. He would harp upon the condition incorporated in the sale deed as regards the extension granted of a month for payment of the amount in case if the cheque for consideration is dishonoured. He would as such

urge that time was not the essence of the contract. He would then add that pursuant to the provisions of Section 54 and 55 of the Transfer of Property Act a sale could be absolutely concluded based on the part payment of consideration and for recovery of balance consideration the seller can claim lien over the property of purchaser. According to him, the remedy lies with the Respondent-plaintiff seller of recovery of amount i.e. part consideration from the property of the appellant purchaser. So as to substantiate his claim he would invite attention of this Court to the judgment in the matter of **"Kaliperumal Vs. Rajagopal and another"** reported in **2009 AIR (SC) 2122**, particularly, paragraph 8 which reads thus :

"8. Sale is defined as being a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the properties sold. No rights are left in the transferor. The price is fixed by the contract antecedent to the

conveyance. Price is the essence of a contract of sale. There is only one mode of transfer by sale in regard to immovable property of the value of Rs.100 or more and that is by a registered instrument. It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 (Act for short) defines sale as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to

a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55(4)(b) of the Act. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property. The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after

receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of Evidence Act."

In addition, the learned counsel would rely upon the judgment of **"M/s Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by L.R's Vs. State of Maharashtra"** reported in AIR 1979 Supreme Court 720, particularly, para 7 so as to claim that in an eventuality viz. the recitals in Exh.73, the time can not be inferred to be an essence of the contract. According to him, the appeal as such needs consideration.

7. Per contra, Mr.V.D.Sapkal, learned

counsel for Respondent-plaintiff would urge that the present appellant has no respect for the rule of law. According to him, the appellant had chosen to undergo imprisonment than parting with the balance consideration as was due and payable under sale deed Exh.73. He would then urge that the recitals in Exh.73 provides for cancellation of sale deed in case if the amount of consideration including part amount is not paid. He would then urge that the judgment cited will be of hardly any assistance as the document Exh.73 speaks of the consequences in case if the time as prescribed is not followed and if the consideration in its entirety is not parted. He would sought dismissal of appeal.

8. Considered rival submissions and with the assistance of respective counsel perused sale deed Exh.73. Exh.73 sale deed did provide for passing of consideration to the cheques and in case if cheque is not cleared, the appellant was duty bound to pay the said amount within one month along with interest as prevailing in the banking transaction. It further incorporates in

clause that in case the amount is not paid, the sale deed will be considered to be cancelled. Apart from above, it is required to be noted that the present appellant has admittedly not parted with the entire consideration as is apparent from his pleadings in the suit and also to be inferred from the conduct having undergone the imprisonment after was convicted for an offence punishable U/s 138 of the Negotiable Instruments Act. Even after conviction the appellant has not parted with the amount of compensation, the fine amount and also has not paid the consideration amount.

9. In the aforesaid backdrop, if the recitals in the sale deed Exh.73 are appreciated, the said recitals in clear terms speaks of cancellation of sale deed in case if the cheque is dishonoured and amount of consideration not paid. The said eventuality is not considered in the judgment of the Apex Court in the matter of "Kaliaperumal Vs. Rajgopal and another" cited supra. It is required to be noted that in the said judgment while interpreting provisions of

Section 54 of the Transfer of Property Act, the Apex Court considered that in case of sale deed speaks of parting of part consideration and vesting of absolute right/title in favour of the purchaser the seller has a lien over the property. In the case in hand it is required to be noted that the said legal fiction will not be applicable for the reason that the eventuality is answered itself in the sale deed Exh.73 which provides that in case if the part consideration is not paid by honouring the cheque, the sale will be termed to be cancelled. Since the sale deed itself provides for consequential clause, the claim that the Respondent will have lien over the property of appellant, particularly, in the backdrop of the definition of sale prescribed U/s 54 of the Transfer of Property Act, will be of hardly any assistance to the present appellant. Even till date, the fact remains the appellant has neither paid consideration nor paid compensation or fine amount. Apart from above, the fact remains that the document Exh.73 since itself provides for consequences in case if the amount of consideration is not paid within time,

parting of possession at the time of sale deed in my opinion will be of hardly any consequence over the issue of determination of right of the appellant, particularly, claiming absolute title over the suit property. The appellant who claims to be title over the suit property by virtue of Exh.73 was well aware from the recitals of the said document that the amount has to be parted within the time stipulated, failing which the consequences will follow. In the aforesaid backdrop, the claim that the time was not the essence of the contract, particularly, by drawing support from the judgment of the Apex Court in the matter of **"M/s. Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by L.R's Vs. State of Maharashtra"** cited supra will be of hardly any assistance. In the case in hand though there appears to be a concluded contract, however, such contract was with a rider thereby incorporating a negative contract as regards cancellation of the sale deed which was not an issue in the matter of **"M/s. Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by**

L.R's Vs. State of Maharashtra". As such the said judgment of the Apex Court will be of hardly any assistance.

10. For the aforesaid reasons, I hardly see involvement of any question of law in the present Second Appeal. The Second Appeal as such must fail and is dismissed.

(N.W.SAMBRE, J.)

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