

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 310 OF 2014
WITH
CIVIL APPLICATION NO. 885 OF 2014

BHAT NAGARKAR DEVELOPERS,
A registered partnership firm under the
Partnership Act, having its place of business
at Karnik Apartment, Erandwane, Pune
through its partner Mr Tushar Pramod
Nagarkar, Age 38 years, Occupation:
Business, having place of business at Karnik
Apartment, Erandwane, Pune.

...

Appellant

~ VERSUS ~

1. **DILIP DHONDIBA GAIKWAD,**
Age 40 years, Occupation Agriculture
2. **SMT SUSHILA GAWALI**
CHOPADE,
Age 52 years Occupation Housewife
3. **MRS VASATALA MANIK**
NIKALJE,
Age 50 years, Occupation Housewife.
All Nos. 1 to 3 are residing at Vadgaon
(Budruk), Taluka Haveli, District
Pune
4. **LATE BAYADE BABU OVAL,**
since deceased through its legal heirs
and representatives Defendants Nos.
5 & 6.

5. **SMT KUSUM DADA KAMBLE,**
Age 45 years, Occupation Not known
6. **VITHABAI VILAS KAMBLE,**
Age 40 years, Occupation Not known
Both Nos. 5 & 6 residing at Tadiwala
Road, Railway Quarters, Pune 411 001
7. **SANJAY BHIMRAO TANPURE,**
Age 32 years, Occupation Service,
residing at Balaji Nagar, Dhankavadi,
Pune 411 043
8. **PRITHVIRAJ NAMDEO
GAIKWAD,**
Age 50 years, Occupation Business,
Residing at Dhankawadi, Pune 411
043
9. **K.D. ASSOCIATES**
(A firm duly registered under the
provisions of the Partnership Act)
having its registered office at 129+193,
Shaniwar Peth, Pune 411 030
Summons to be served on
Nandkumar Gopal Kulkarni, Age 52
years, Occupation Business, residing
at 1144, Sadashiv Peth, Pune 411 030 ... **Respondents**

APPEARANCES

FOR THE APPELLANT	SM Gorwadkar, Senior Advocate, i/b SH Gangal.
FOR RESPONDENT NO. 1	GS Godbole, i/b Karan S Thorat,
FOR RESPONDENT NO. 9	SS Kanetkar.

CORAM : G.S.Patel, J.

DATED : 9th June 2017

ORAL JUDGMENT:

1. The Appeal is filed by the original Plaintiff against an order and judgment dated 26th February 2014 on one of two preliminary issues framed under Section 9A of the Code of Civil Procedure 1908 (“CPC”). Before the learned Judge in a suit for specific performance for sale of land, the Defendants raised two preliminary issues. The first was of a statutory bar *inter alia* under the Bombay Tenancy & Agricultural Lands Act 1948 and the Bombay Inferior Village Vatan Act 1958. On that issue, the Plaintiff succeeded. The Defendants have not appealed.

2. The Defendants also raised a plea of limitation saying that the suit for specific performance of the Agreement dated 11th November 2005 was barred by limitation. The Agreement in question is of 11th November 2005. It pertained to Survey No. 10 Hissa No. 1 of revenue village Wadgaon, Taluka Haveli, District Pune. This is a tract of land of about 56 Ares, just over half a hectare. The Plaintiff’s case was that since Defendants Nos. 7 and 8 were finding it difficult to develop the land they entered into an Agreement for Sale dated 11th November 2005. Defendants Nos. 1 to 3 and another party interested in the land were also parties to the Agreement. The consideration was Rs. 1,25,00,000/-. The Plaintiff paid the stamp duty charges. In the plaint, there is a tabulation below paragraph 4 showing how the payments were made between

2005 and, according to the Plaintiff, right until 2010. The Plaintiff's claimed that this Agreement for Sale was confirmed by a subsequent Deed of Confirmation dated 9th February 2007. Then come paragraphs 7 and 10 and, for the purposes of limitation, these are the crucial paragraphs of the plaint. They read thus:

"7. It is further submitted by the Plaintiff that **some time in the month of November 2011 in meeting between the partners of the Plaintiff and the Defendant No. 7 and 8, it was revealed by the Defendant No. 7, 8 that M/s. K.D. Associates had filed RCS No. 174/2003 against the Defendants No. 1 to 3 and Late Bayada and Defendant No. 7, 8 for the injunction simplicitor in respect of the suit property and which was dismissed Hon'ble Civil Judge Senior Division by Judgment and Decree dated 06/03/2008 holding that agreement for the sell/development between the Defendant No. 1 to 3 and Late Bayada and said K.D. Associates is illegal, null and void.** That upon the said Judgment Defendant no. 9 has preferred the Civil Appeal in the Hon. District Court, Pune by No. 328/2008 and same is pending in the Court. The Plaintiff further submits that he has received the information on about 14.12.2011 through one Mr Lohade S.N. That Defendant No. 1 to 9 have colluded and are in league with each other and in fact partner of the Defendant No. 9 Mr Nandkumar Gopal Kulkarni with the consent of other Defendant had offered to sale the suit property to said Mr. Lohade and forwarded copies of the title documents including the letter of the Collector permitting the alienation of suit property for his perusal.

10. **The Plaintiff submits that there was no period specified or stipulated for the performance of the agreement. The Plaintiff first time on or about 14th December 2011 came to know that by totally discarding**

or violating the agreement the Defendant No. 1 to 8 are trying to sell the suit property to the third party and thus refusing the performance of the contract to the Plaintiff and thus suit filed is in limitation. Thus in view of Article 54 of the Limitation Act, the suit filed is in within limitation."

(Emphasis added)

3. Defendants Nos. 1 and 2 filed a Written Statement. There is a denial although it is somewhat cryptic saying only that the contentions in paragraphs 7, 8, 9 and 10 of the plaint are denied.

4. The Trial Court correctly framed the two preliminary issues, the first on the statutory bar and second on limitation. In paragraph 9, the learned Judge noted that the Defendant No. 1 filed a pursis at Exhibit 75 and the Plaintiff filed a similar pursis at Exhibit 76, each categorically stating that they did not wish to lead evidence on either of the preliminary issues.

5. The findings in the impugned judgment on the second issue of limitation begin with paragraph 23. The Plaintiff's case appears to have been that time could not be the essence of a contract such as this. No time was specified or stipulated for the purpose of the contract. Therefore, according to the Plaintiff, the suit was within limitation, having been filed within three years of the refusal of performance. That refusal of performance was alleged before the Trial Court to have been on 14th December 2011 on the basis of the averments in paragraph 10 of the plaint, set out above.

6. It is common ground that at no point did either of the sides act to make time the essence of the contract.

7. Paragraph 31 of the impugned order is important and this is how it reads:

"31. However, nothing filed on record by the Plaintiff to show that how, when and why the Defendants have refused to perform their part of contract. The Plaintiff has not produced any oral or documentary evidence of refusal on the part of Defendants to perform their part of contract. However, the Plaintiff has made an averment in para 10 of the plaint that the Defendants no. 1 to 8 are trying to sell the suit property to third party. Thus, it seems that the Plaintiff has suo-motu drawn an inference that, the Defendants are refusing to perform their part of contract and therefore, the limitation for filing of suit of specific performance of agreement to sell will start from 14th December 2011. Therefore, according to Plaintiff the present suit is will within limitation as it is filed on 03/02/2012 i.e. within three years from the date of refusal to perform their part of contract by the Defendants."

8. The Trial Court looked at several clauses of the Agreement of 11th November 2005 and said that the recitals of the Agreement required parties to perform their obligations by a given date. Paragraph 37 of the impugned order reads thus:

"37. However, even if it assuming that said agreement was subsequently confirmed by the Plaintiff by executing deed of confirmation by the Defendants through their Power of Attorney i.e. Defendants no. 7 and 8 on 09/02/2007 and if it assuming that the limitation to

perform their part of contract was extended by deed of confirmation dated 09/02/2007 which seems to be registered on 18/02/2007 even then the limitation will be started from 17/02/2007 and the Plaintiff ought to have get executed a sale deed or to file a suit on or before 17/02/2010 i.e. well within limitation of three years but here in this matter it seems that the Plaintiff has filed a suit on 03/02/2012 though it is clearly indicated from the recital of the agreement dated 11/11/2005 that the time was specified in the agreement to perform their part of contract by the parties. Therefore, it cannot be said that the alleged suit is filed by the Plaintiff well within limitation as provided under first limb of Article 54 of the Limitation Act."

9. Now Article 54, commonly agreed as the applicable one, to the Limitation Act reads thus:

	Description of suit	Period of limitation	Time from which period begins to run
54.	For specific performance of a contract.	Three years	The date fixed for the performance, or, if so such date is fixed, when the plaintiff has notice that performance is refused.

10. The Article refers to the date fixed for performance and then speaks, in its second part, of the time when the Plaintiff had notice that performance was refused.

11. Mr Godbole appearing for Defendant No. 1 submits that on a reading of Clauses 6, 7, 8, 14, 15 and 16 of the Agreement it is clear that there were reciprocal obligations and each was to be performed by a specified date and within a prescribed period. Some of these

relate to the obtaining of permission and consents. However, there is no clause in the Agreement that says that time is the essence or that if not performed by these dates, the Agreement would stand cancelled.

12. Mr Kanetkar for Defendant No. 9 supports Mr Godbole. Defendant No. 9 is a subsequent transferee from Defendants Nos. 1 and 2. It appears that Defendant No. 9 acquired an interest in this very property sometime around 21st February 2014, a few days before the impugned judgment was delivered. That is however not the issue. Mr Kanetkar's submission is that the case must fall within the first portion of Article 54 and, as Mr Godbole says, the dates fixed in the Agreement must be taken, on non-performance of those obligations, as the starting point of limitation.

13. I am not persuaded to accept the correctness of this submission. It may so happen that a date may be fixed for certain obligations, which may later become unnecessary, or which the parties may decide by agreement or be shown by conduct to have extended. There may be cases where, for instance, in the agreement permission may be required under the Urban Land Ceiling Act as it then stood but that by passage of time this requirement is rendered otiose. There are many possibilities and it would not be possible without an express stipulation in the contract to say that any of these dates which require parties to perform a series of obligations is "the date fixed for performance". It is equally possible that an agreement might say, for instance, that a particular type of permission is to be received within a specified period but the authority in question may

not actually given that permission within that time at all. This does not on its own mean that there is a breach of the agreement.

14. To my mind, the second limb of Article 54, is the one that would apply; and this is for two reasons. The first is that this is the Plaintiff's case, and the Plaintiff says so in paragraph 10 of its plaint. It insists that there was a threatened breach. The Plaintiff puts a date on this as 14th December 2011. It is on this date when, according to the Plaintiff, it had notice that the performance of the agreement was refused. Why should the Plaintiff not be required to prove this date? That is the question that Mr Godbole and Mr Kanetkar pose, and I think quite correctly.

15. Mr Gorwadkar for the Plaintiff readily agrees that there is no ground taken in the Memo of Appeal that the Plaintiff was under any disability, compulsion or incorrect advice when it has filed its pursis committing not to lead any evidence. His submission, based on the decision of the Supreme Court in *Gunwantbhai Mulchand Shah & Ors v Anton Elis Farel & Ors*¹ is that the Court should have on its own, this being a mixed question of fact and law, and there being a requirement of ascertaining a date, insisted on the parties leading evidence on the question of limitation.

16. The observations in paragraph 8 of *Gunwantbhai* appear to me to be peculiar to the facts of that case although I must note that even in that case there was a pursis filed by both parties agreeing not to lead evidence. The point, however, that Mr Godbole and Mr

1 (2006) 3 SCC 634.

Kanetkar make is different. We find here a specific averment of a given date. The Plaintiff was given an opportunity of leading evidence. In a sense, it took a gamble. It chose not to lead evidence. It proceeded on the basis that no oral evidence was necessary and the documents on record were enough. I think it would be highly unfair if parties were allowed to continuously second-guess Courts and themselves in this fashion. Litigation cannot be treated as a game of chance. Having failed in its attempt to proceed without evidence, I do not think it is at all reasonable for the Plaintiff to now say as it does that the matter should be remanded and the Plaintiff should now be allowed to lead evidence only because it has failed on the issue when it consciously and deliberately chose not to do so. Matters might have been different had the Plaintiff been under some disability (what that possibly could be I cannot imagine, the Plaintiff being a developers) or being incorrectly advised. That is not even their case. The path that Mr Gorwadkar commends seems to me to be one fraught with danger for Court and litigant alike. No litigation will ever end. Indeed, why only on a preliminary issue, at every stage of a suit, whenever a pursis is filed and a party closes its case, he will then tell an appellate court that his gambit having failed, he now wishes to lead even more evidence and ask for the matter to be remanded. Litigation demands finality. Sometimes that finality comes sooner rather than later, and sometimes it comes at the hand of the Plaintiff himself. Carrying Mr Gorwadkar's submission to a logical conclusion means that if a plaintiff was to be unseated *after* leading evidence, he might always be able to tell a court in appeal that he wanted to lead even more, and, in that sense, try and get himself a second bite at the cherry. A lawsuit is not like a game of street cricket. If a plaintiff, put in to bat first, shoulders arms and

finds his middle stump cart-wheeling, he cannot demand a second chance. In litigation, there are no 'trial balls'.

17. Mr Gorwadkar submits on the basis of Order 8 Rules 3 and 5 that a remand may be necessary for want of a specific denial. This is, too little too late. The Written Statement filed by the 1st Defendant does not only contain a generalized denial. The general denial is in paragraph 12 of the Written Statement but in the preceding 11 paragraphs the Defendant No. 1 has quite comprehensively disputed the case of the Plaintiff. This includes the specific denial of there being a subsisting agreement and of payments having been made in the manner alleged. It was also never argued before the learned Single Judge that the issue of limitation should be answered in favour of the Plaintiff for want of a specific denial. I believe it would be most unjust to set aside a judgment and order on the basis of a plea never taken before that Court or even to ask for it to be remanded. The Plaintiff did not proceed on the basis of admission by non-traverse.

18. Mr Godbole is correct, I think, in his reliance on the well-known decision of the Supreme Court in *Vidyadhar v Manekrao & Anr*² on the point that where a party declines to give evidence, a presumption that the case he sets up is incorrect must follow. Although it is correct that the learned Single Judge's finding in paragraph 37 is difficult to sustain, I have no manner of doubt that it was for the Plaintiff to establish the starting point of limitation. The reason for this is straightforward. Even if a defendant does not raise

2 (1999) 3 SCC 573.

a plea of limitation, a Court may on its own call for the plaintiff to prove that the claim is within time. Where a defendant raises a specific limitation bar plea, it is always for the plaintiff to prove that the suit is within time. It is never enough for the plaintiff to contend that since the defendant has also not led evidence the suit must be assumed to be within time. Article 54 in particular requires a plaintiff to establish by evidence — always a mixed question of fact and law — the starting point of limitation and to show that the Suit is within the period of three years from that date specified in Article 54. If the plaintiff chooses not to set foot in the witness box, the consequences must follow against the plaintiff. A plaintiff's default or, as in this case, his studied and deliberate refusal to lead evidence, cannot be turned to his advantage either in the Trial Court or in Appeal. Returning briefly to the pleading in paragraph 10 of the plaint: in support of the suit being brought in time, this Plaintiff pleaded a very specific event on an exactly specified date. The burden was, as it normally is, on he who asserts it. The Plaintiff had to prove that what it said in paragraph 10 actually happened, and that it happened on 14th December 2011. Even according to the Plaintiff itself, it was this date that furnished it with a starting point for limitation. Not having proved this fact, the Plaintiff cannot succeed on a mere assumption. If there is an inference to be drawn, it must be drawn against the Plaintiff, not for it.

19. I am not persuaded that the order under Appeal requires interference. As regards the finding in paragraph 37, Mr Godbole is, in my view, correct that even if that finding is set aside, the judgment under appeal can be otherwise sustained.

20. The Appeal is dismissed. There will be no order as to costs.

21. In view of dismissal of the First Appeal, nothing survives in the Civil Application and the same is disposed of as infructuous. No costs.

(G.S. PATEL, J.)