

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.333 OF 1994
WITH
CIVIL APPLICATION NO.66 OF 1999

C.T. Bhalerao & Ors.
Hindu, Adult, aged about 70 years,
Occ.: Retired, Residing at Plot No.17,
Bhalerao Bhavan, Jilla Peth,
Tagorenagar,
Jalgaon, Dist. Jalgaon
(since expired) thru' his Legal Heirs

1 Smt. Kesarbai w/o Chindhu Bhalerao
Age : 70 years, Occ. Household,

2 Sou. Laxmibai Uttam Wankhede
Age : 30 years, Occ. Household

3 Shri. Ramesh Chindu Bhalerao
Age : 44 years, Occ.: Service

All R/o Bhalerao Niwas,
Tagorenagar, Jalgaon, Dist. Jalgaon

4 Sou. Kasturibai Shamrao Sapkale
Age : 52 years, R/o: Manera Village,
Taluka Kalyan, Dist. Thane

5 Sou. Durgaben Arjun Sapkale
Age : 48 years, R/o T.B.S. Hospital,
Mehrun, Jalgaon, Dist. Jalgaon

6 Shri. Vasant Chindhu Bhalerao
Age : 46 years, R/o : Faizpur,
Taluka Raver, Dist. Jalgaon

7 Sou. Sulochana Ramdas Sapkale,
Age : 40 years, R/o Sitaramnagar,
Near Bk. No. 1425, Ulhasnagar 4,
Dist. Thane.

.... Appellants
(Original Plaintiffs)

Shri. Laxman Namdeo Sapkale
Age : 69 years, Occ.: Retired
Residing at Sitaram Nagar,
Maratha Section, Ulhasnagar 4,
Dist. Thane

Substitute in place of Appellants as per
order dated 27 February 2012 in C.A.
No. 555 of 2011

Vs.

Shri. Ganu Bala Jogdande
since deceased, thru' his heirs and LRs

.... Respondents
(Original Defendants)

1 Smt. Parvatibai Ganu Jogdande
since deceased thru' her LRs
Respondent Nos. 2 to 5.1 herein

2 Jagan Ganu Jogdande
Age : 56 years

3 Madhukar Ganu Jogdande,
Age : 56 years,

- 4 Smt. Jayashri Prakash Nikam
Age : 49 years, (since deceased)

4a Prashant Prakash Nikam

- 5 Smt. Kalavati Waman Chandanshive
since deceased thru' LR.

5. 1 Dadi Waman Chandanshive
All residing at Near Barrack No.1425,
Maratha Section, Sitaram Nagar,
Ulhasnagar 421 004, Dist. Thane

Ms. Gauri Godse for the Appellants/Applicants.
Mr. Sanjay Thokade for Respondent Nos. 4 and 5.1

Coram : **N.M. Jamdar, J.**

Date : 20 April 2017

ORAL JUDGMENT :

The Second Appeal is filed by the original Plaintiff, who has been unsuccessful in seeking the specific performance of the agreement executed between the Appellant-Plaintiff and the Respondent on 12 July 1978.

2 The Respondent-original Defendant is a tenant of the Appellant. The suit property which is of two rooms and Verandah admeasuring 450 sq. ft., is situated at Sitaram Nagar, Ulhasnagar, Dist. Thane.

3 On 12 July 1978, the parties entered into an agreement. The agreement was executed for period of one year. The Appellant styled himself to be the owner of the suit property and agreed to sell the same to the Respondent for an amount of Rs.7,000/-. An amount of Rs.3,800/- was received by the Appellant. The remaining amount of Rs.3,200/- was agreed to be given on 11 July 1979. It was agreed that the remaining amount of Rs.3,200/-, if not paid would be adjusted against the monthly rent due at the rate of Rs.55/- and after cancelling the agreement, the possession of the suit property would be given to the Appellant.

4 Since the agreement did not materialise, the Appellant filed Regular Civil Suit No. 231 of 1980 in the Court of Civil Judge, Junior Division, Ulhasnagar. It was contended by the Appellant that the suit premises were given to the Respondent on a monthly lease. The agreement dated 12 July 1978 was relied upon and the contents therein were reiterated. It was stated that since the Respondent did not handover possession of the suit premises, the Court should direct the Respondent to handover possession of the suit property. The certain mandatory relief was also sought for. The Respondent contested the suit.

5 The learned Civil Judge, by the judgment and order dated 31 August 1988, dismissed the suit. The learned Judge held that the Appellant failed to perform his part of contract and that the Appellant had failed to prove that he had a marketable and clear title for selling the suit property. The learned Civil Judge also held that the Respondent being tenant of the suit property, his possession is protected under the Bombay Rent Act.

6 Appeal No. 368 of 1988 was filed by the Appellant in the District Court, Thane. The learned District Judge, held that the Appellant had failed to prove that he was ready and willing to perform his part of contract. The learned District Judge held that the observations made by the learned Civil Judge regarding the tenancy rights of the Respondents were not necessary for adjudication of the present dispute. The learned District Judge accordingly dismissed the appeal by the judgment and order dated 28 February 1994.

7 Thereafter the present Second Appeal is filed. The Second Appeal was admitted on 26 April 1994. Question of law that was framed was regarding applicability of Section 16 of Specific Relief Act, 1963 (for short “the Act of 1963”) .

8 Heard Ms. Gauri Godse, the learned Advocate for the Appellants and Mr. Sanjay Thokade, the learned Advocate for the Respondents.

9 Ms. Godse, the learned counsel for the Appellant submitted: The question of law is so framed because in the facts of the present case, there is no applicability of Section 16 of the Act of 1963. The agreement dated 12 July 1978 was uncomplicated agreement which conferred no duty on the part of the Appellant to do any acts and if the amount was not paid, the Respondent was to handover the possession. The agreement is accepted and so also the contents therein. The question as to whether the Appellant is owner of the land below the structure is irrelevant as what was in question was a structure, in respect of which the agreement was executed and both the parties were fully aware of the terms and conditions. As provided in the agreement, the rights of the parties stood determined and the Respondent was under obligation to hand over the possession. If the Respondent had paid the amount, he would get the ownership of the suit property as per the agreement and there was nothing further the Appellant was to do. Therefore reference to payment of taxes, permission of Urban Land Ceiling Authorities are, irrelevant by the bare perusal of the agreement. The reference to Section 16 of the Act of 1963 not being necessary, suit ought to have been decreed.

10 Mr. Thokade, learned counsel for the Respondent submitted: The suit being filed for specific performance of the agreement, the Court will have to consider whether the Appellant was ready and willing to perform his part of contract. Reliance was placed on the decision of the Apex Court in the case of ¹*H.P. Pyarejan vs. Dasappa (dead) by LRs and Others*,-. Time was not essence of the contract and no steps were taken by the Appellant to rescind the contract. Section 17 of the Act of 1963 states the essential terms, which the vendor has to comply and in the present case, the Appellant has agreed that he has not paid taxes. Section 55 of the Transfer of Property Act, 1882 needs to be noted. In the case of ²*Balasaheb Dnyandeo Naik (dead) thru' LRs and Ors. vs. Appasaheb Dattatraya Pawar*, law is laid down in respect of the time not being essence of contract in respect of immovable property. There was no averment in the plaint regarding readiness and willingness.

11 When a suit for specific performance of an agreement is filed, the Court has a discretion in directing the specific performance. The decree of specific performance of an agreement is not automatic on presentation of the agreement. The Specific Relief Act makes it clear that the power to grant the decree of specific performance is

¹(2006) 2 Supreme Court Cases 496

²(2008) 4 Supreme Court Cases 464

discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. The discretion of the Court however has to be guided by judicial principles, correctable by the Court of appeal. One of the consideration for exercise of the jurisdiction is the Section 16(c) of the of the Act of 1963. Section 16(c) mandates that a party seeking specific performance must be ready and willing to perform their part of the contract. Therefore whenever a suit is filed seeking specific performance of an agreement, the readiness and willingness of the party becomes an essential attribute of the enquiry.

12 It is contended by Ms. Godse that both the courts needlessly placed reliance on Section 16 of the Act of 1963 as the present agreement does not place any obligation on the part of the Appellant. The contention is that in the present case the Section 16 of the Act of 1963 has to be excluded for consideration by the Court. This submission cannot be accepted. Firstly, because it cannot be said that there was nothing to be done by the Appellant under the Agreement. The Appellant, had represented in the agreement that he was selling the suit property, which was in his ownership. An amount was agreed to be paid by the Respondent. But if the amount was not paid, consequence was provided of adjustment towards the rent. Thereafter the agreement was to be determined and thereafter the possession was to be handed over. The wording used in the agreement,

which is in Marathi, are important. It was stated that if the amount is not paid, the agreement would have to be *declared as cancelled* and the suit property would be returned. Thus the parties would have to take steps to get the Agreement declared as cancelled or rescinded. The Agreement does not state that automatically the Suit Property is to be handed over. The argument advanced by the Appellant is by omitting this crucial step.

13 In the cross-examination of the Appellant, the Appellant has accepted that the Appellant did not issue any notice demanding the balance consideration. The Appellant also did not give any notice before filing the suit. The Appellant also gave admissions in the cross-examination that the Appellants had not taken certificate of tax clearance. He, however, stated that it was not necessary to produce tax clearance certificate. He had not taken permission from the Urban Land Ceiling Authorities. He stated that he had not paid any dues because it was not necessary. On the other hand, the Respondent has made a categorical statement that the Respondent was ready and willing to perform his part of contract, however, since the Respondent found impediments in the way of the property being conveyed and the Respondent had requested requisite permissions in respect of the land, which were not supplied by the Appellants, the property could not be purchased.

14 The Agreement contained a step before handing over of the possession by the Respondent, which is the act of cancellation of the agreement. Since handing over of the possession was not automatic, the question that arises is what is the effect of the Appellant not giving any notice to the Respondent before filing the suit or notice calling upon the Respondent to pay the balance consideration, or to cancel the agreement. The further question, therefore would arise is whether these factors would be relevant for non grant of specific performance as has been done by the learned District Judge.

15 Mr. Thokade relied upon Section 17 of the Act of 1963, which deals with contract by a person who has no title. This provision takes into consideration the contingency when a vendor who has title to the property, contracts to sell the property. It was contended by Mr. Thokade that the Appellant, knowing fully well that he had no title to the land had stated so in the agreement and the Appellant was precluded from seeking specific performance. Ms. Godse sought to counter this submission by contending that in the written statement there was no objection to the ownership of the Appellant and this point cannot be held against the Appellant.

16 Since the grant of specific performance is discretionary, the conduct of the Appellant is also necessary to be seen. The Appellant

had specifically stated in the agreement that the suit property was in his ownership, which was a structure on a land which did not belong to the Appellant. This fact was not disclosed in the agreement. It is in this context, the Appellant was required to take steps to convey the title. Section 55 of the Transfer of Properties Act, 1882, defines the rights and liabilities of the buyers and sellers and the lays down various obligations of a seller. The concept of Readiness as envisaged under the statutory provision is also material. The 'readiness' under Section 16(c) of the Act of 1963 includes readiness to perform such obligations which are cast by the statutory provisions.

17 Considering this position, it cannot be said that the Appellant in the present case was somehow immune from making any averment in the plaint in respect of his readiness and willingness. Section 16 of the Act of 1963 mandates that there will be a bar to specific relief in favour of one who fails to plead and prove that he has been ready and willing to perform essential terms of the contract. Therefore, the contentions of Ms. Godse that even in absence of any averment in the plaint, relief should have been granted in favour of the Appellant, cannot be accepted.

18 In the case of *H.P. Pyarejan*, the Apex Court has analysed the provision of Section 16(c) of the Act of 1963. The Apex Court

held that the plaintiff, apart from making an averment in the plaint, must also establish that he was ready and willing to perform his part of the contract. The Court must be satisfied that the Plaintiff was and is ready and willing throughout to perform his part of the contract. In the present case, as stated earlier, the Appellant did not even send a single notice before filing the suit and did not make an averment that he was always ready and willing to convey the property to the Respondent. The Appellant even did not take any steps to cancel or rescind the agreement.

19 Mr. Thokade also relied upon the decision of the Apex Court in the case of *Balasaheb Naik* . In this decision, the Apex Court emphasized the principle that time is not the essence of contract in respect of immovable property, unless contract intention is expressed in unequivocal terms. In the agreement at hand, the amount is to be paid within a period of one year and a contingency is provided therein that the balance amount would be adjusted against the rent and then the parties to take steps to get the agreement cancelled. Therefore time was not the essence of contract. The argument that, and upon failure to pay the amount within a period of one year, automatically possession had to be handed over, cannot be accepted.

20 Ms. Godse then contended that if the dismissal of the suit and the appeal are confirmed, the Appellant will be left without remedy, as the suit against the Respondent as a tenant, cannot also be filed. This apprehension is not warranted. The learned Civil Judge has held that the action of eviction if any, will have to be taken against the Respondent under the provisions of the Rent Laws. The District Court has only held that the issue did not arise in the present case. Apart from this position, it is the specific contention of the Respondent in this Court also that the Agreement having lapsed, the parties will revert back to the original position of the landlord and tenant. In view of this categorical stand, the apprehension expressed by the learned counsel for the Appellant, is not warranted. Therefore, the disposal of the present appeal will not come in the way of the Appellant to take suitable steps under the provision of Rent Laws governing the parties.

21 In conclusion, the question of law framed regarding the applicability of Section 16 of the Act of 1963, will have to be answered against the Appellant. This provision, in the facts and circumstances of the case, is applicable. The finding recorded by both the Courts that the Appellant was not ready and willing to perform his part of contract, will have to be upheld as there is no perversity in this conclusion. Accordingly, the Second Appeal stands dismissed.

22 In view of dismissal of the Second Appeal, the Civil Application does not survive, the same is accordingly disposed of.

(N.M. Jamdar, J)