

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

1 APPEAL FROM ORDER NO. 84 OF 2016

Gitabai w/o. Anant Limaye
Age: 47 years, Occu.: Agriculture,
R/o.Bilwa, 12/A, Shilpa Nagar,
Station Road, Aurangabad. ..Appellant

VERSUS

Farhatulla Khan s/o. Hameed Khan
Age: 59 years, Occu.: Business,
R/o.Behind Johar Hotel, Mill Corner,
Aurangabad. ..Respondent

...

Advocate for Appellant : Mr.Amar D.Soman
Advocate for Respondent : Mr.Shaikh A.T.Patel and
Mr.G.M.Patel

...

CORAM : M.S.SONAK, J.
DATE : 29.1.2018

ORAL JUDGMENT:-

1) The challenge in the appeal is to the order dated 18.9.2015 made by the Trial Court on appellant's application at Exh.18 in Special Civil Suit No.162 of 2015. The original plaintiff has instituted his suit for specific performance. In the said Suit, the appellant

herein who is defendant, made categorical statement that the appellant is willing and ready to execute sale-deed in terms of agreement of sale dated 4.9.2014 for its specific performance applied for, providing the respondent i.e. original plaintiff pays/deposits balance consideration amount of Rs.5,25,10,000/- in the Court.

2) The Trial Court, after hearing the parties, disposed of the said application by the impugned order dated 18.9.2015. Paragraph Nos.5 and 6, which include the operative portion of the impugned order reads as follows:

"5. Taking into consideration the fact that, plaintiff has filed present suit against defendant contending that, he is ready and willing to perform his part of contract but defendant is not ready to perform her part. It is necessary for plaintiff to show his willingness to pay the remaining amount of consideration. Ld. Advocate for defendant Shri Gangtire argued that, defendant is not asking

plaintiff to pay the remaining amount of consideration to the defendant but praying that the amount be deposited in the Court.

6. The controversy regarding situation and measurement of suit property is concerned it can be resolved during the trial. I agree with the argument of the Ld. Advocate for defendant as defendant as ready and willing to perform the contract if plaintiff deposits balance consideration amount in the Court. It is also necessary to show ready and willingness of plaintiff to perform his part of contract by depositing balance amount of consideration in the Court. Hence, I proceed to pass the following order:-

O R D E R

1] Application is allowed.

2] Plaintiff to deposit balance amount of consideration Rs.5,25,10,000/- in the Court.

3] Application is disposed of.

Sd/-

Place: Aurangabad

(K.V.More)

Date: 18-09-2015

3rd Joint C.J.S.D.Aurangabad"

3) From the aforesaid, it is clear that infact, Exh.18 was substantially decided in favour of the appellant, however, the appellant is only aggrieved by the omission on the part of the Trial Court in not fixing a time limit for deposit of balance consideration amount. It is pointed out that on account of such omission, respondent is refusing to deposit the amount and went on raising one dispute and other as to avoid deposit. The limited challenge in this appeal therefore is related to the omission on the part of the learned Trial Court to fix time limit for deposit of the balance consideration amount.

4) This appeal from order, came up for hearing on several occasions and was adjourned from time to time in order to enable Mr.Patel learned counsel appearing for the respondent to take instructions as to time limit within which such amount will be deposited. This was on the basis that it was an obvious omission on the part of

the learned Trial Court to fix the time limit. The impugned order as noted the above, clearly directs the respondent to deposit the balance consideration amount. However, since, no time limit is specified, the Trial Court has rendered its own order ineffective thereby affording an opportunity to the respondent to avoid deposit. This is a case of obvious omission, which borders on the arena of error apparent on the face of record. However, on realizing that the amount involved is substantial and with that view for fairly granting the respondent some time to deposit the amount to show bonafides, this Court has been indulging the respondents. This is quite evident from the various orders made from time to time in this matter.

5) However, it is unfortunate to record that the respondent has attempted to exploit such indulgence. For example, with the same direction to obtain instructions, the matter was posted on 24.1.2018. On such date, an

adjournment was applied for on the ground that Mr.Patel was sick and therefore, unable to attend this Court. Since adjournment was applied on learned counsel's sickness, the same was granted, however, this Court made the following order on 24.1.2018:-

"1 On the last occasion, learned Counsel for the respondent was requested to take instructions from the respondent as to the time limit within which they would deposit before the trial Court an amount of Rs.5,25,10,000/- in terms of the order made by the trial Court below Exhibit-18.

2 Today, when the matter is called out, Mr.Govind Kulkarni, who holds for Mr.Ashpaq Patel, learned Counsel for the respondent, seeks time on the ground that Mr.Patel is sick.

3 Mr.A.D.Soman, learned Counsel for the appellant, submits that on last several occasions, when the matter has been adjourned, to enable learned Counsel for the respondent to take instructions as to the time limit within which the amount is to be deposited, on the following

dates, learned advocate Mr.Patel has reported sick. He submits that this is a repeat of what has happened on the past few occasions and, therefore, he submits that no further adjournment should be granted in this case.

4 Without commenting upon what may or may not has happened on the past occasions, now that adjournment is applied for on the ground of Mr.Patel's sickness, it is only proper that the matter is adjourned till 29th January, 2018, so as to enable Mr.Patel to make a statement, however, it is made clear that if, by Monday, Mr.Patel is unable to attend the Court proceedings or is unable to obtain any instructions, then, alternate arrangement will have to be made because, it is not possible to keep on adjourning this matter. Mr.Kulkarni undertakes to inform Mr.Patel about this order today itself.

Stand over to 29.01.2018, first on board.

Sd/-
M.S.SONAK
JUDGE"

6) Today, when the matter was called out, Mr.Patel

appeared and tendered affidavit in reply. To the pointed query as to whether instructions have been obtained as to the time limit within which the balance consideration amount will be deposited, again Mr.Patel argues that since the appellant is yet to perform his part of the contract, the direction for deposit ought not to have made. What is most surprising is that on 24.1.2018 on the date which Mr.Patel was reported to be sick, the respondent has instituted a Writ Petition to challenge the order dated 18.9.2015 i.e. order impugned in this appeal. Such writ petition has been instituted after more than 2 and 1/2 years. Such writ petition has been instituted after seeking time to obtain instructions as to time limit within which the deposit will be made. Such writ petition has been instituted possibly to see whether the hearing of this appeal is derailed since, the assignment of taking up writ petitions is not before this Court. Be that as it may, as of now, the order dated 18.9.2015, to that extent, it requires the respondent to

deposit the balance consideration stands. The only question is whether the omission to prescribe time limit was justified. Clearly, the omission to prescribe time limit was not at all justified and to that extent the impugned order dated 18.9.2015 is required to be modified.

7) Mr.Patel's submission that the land is covered under Ceiling Act or is covered under certain other Legislations, which prohibits sale without permission of Collector or some other authorities cannot be entertained in this case. In any case, Mr.Patel clarifies that such contentions do not apply to Appeal from Order No.84 of 2016 but apply to Appeal from Order No.82 of 2016. Admittedly, Appeal from Order No.82 of 2016 relates to some other property and on the basis of the same, hearing in this petition was again attempted to be derailed by Mr.Patel by submitting that this appeal is ordered to be heard alongwith Appeal for Order No.82 of 2016. However,

Mr.Patel was unable to show any such order.

8) In any case, it is necessary to clarify that whatever objections that respondent may have, have not been shut-out by the Trial Court. The impugned order does not direct payment of balance consideration directly to the appellant. The impugned order only directs the deposit of said consideration.

9) In the facts and circumstances of the present case, such a direction is quite correct because it is for the respondent/plaintiff to establish that he was not only ready and willing to fulfill his part of the contract, but further he continues to and willing to continue his part of contract.

10) The impugned order is accordingly modified. The respondent/original plaintiff is directed to deposit before the Trial Court the balance consideration of

Rs.5,25,10,000/- within a period of two weeks from today, failing which it will be open to the Trial Court to make such order as is permissible under law. In making such an order, the Trial Court will not be influenced by its earlier order dated 8.7.2016 by which the application under Order 7 Rule 11 came to be rejected.

11) The appeal is accordingly allowed in the aforesaid terms.

12) The respondent shall pay costs of Rs.5,000/- to the appellant, again within a period of two weeks from today.

[M.S.SONAK, J.]