

Sarnobat

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 269 OF 2018

Smt. Shailaja Madhukar Pitre. ... Appellant.
Vs.
Sr. Purushottam Nasik Deshmukh. ... Respondent.

Mr. K. S. Dewal I/by Jayesh Joshi, for the Appellant.

CORAM : A. M. DHAVAL, J.

DATE : 18th SEPTEMBER, 2018.

JUDGMENT :

1. This second appeal is by the original plaintiff. Heard learned advocate for appellant. Regular Suit No. 664 of 2003 was decreed by Civil Judge, J.D. Bhivandi on 27th August, 2008 and she was called upon to deposit remaining amount and the defendant was called upon to execute sale-deed within two months. In the first appeal No. 135/2008 learned District Judge, Thane converted the decree of specific performance into money decree and the defendant was directed to refund consideration amount to the plaintiff. Hence, this appeal.

2. The judgment and arguments disclose following facts;

2.1) By agreement dated 13.01.1984, the defendant

agreed to sale the suit land admeasuirng 02 H. 37 R. at the rate of 7,000/- per Acre and received Rs.1001/- on 31.12.1983 and Rs.20,000/- on the date of agreement. It was agreed that the Registered sale-deed was to be executed within three months.

2.2) On the same day separate possession receipt was passed and assurance was given on 17th January, 1984 to obtain consent of the Collector. Scheme of Panjarpol was applicable to the same.

2.3) On 13/03/1984 application for permission was made by the defendant to the Civil Judge, Jr. Division Bhinwandi.

2.4) The total consideration was Rs.42,000/- and by 10.05.1984 there were further part payment whereby, total amount of Rs.37,501/- was paid. There is also evidence that additional Rs.2,000/- was paid. Thus out of 42,000/-, Rs.39,500/- was paid.

2.5) It is claimed that the Panjarpol project requiring consent of the Collector was cancelled in 1991-92.

2.6) The original agreement was executed with the plaintiff's husband who was having heart ailment and he died on 16/10/1996.

2.7) Thereafter, in December, 1996 plaintiff requested for specific performance and the defendant the refused. Hence, the suit came to be filed on 11th February, 1997.

2.8) The trial court had held that the plaintiff had proved his readiness and willingness to perform his part of the contract. The suit was not barred by limitation. Time was not essence of the contract. The plaintiff was entitled for specific performance.

2.9) The learned District Judge confirmed. That time was not the essence of contract and the suit was not barred by limitation but, held that the plaintiff was not entitled for specific performance of the contract and the plaintiff was not ready and willing to perform his part of the contract.

3. Mr. Dewal learned advocate for the appellant argued that the learned appellate court committed factual mistake in recording that the plaintiff filed suit after 20 years and therefore, the plaintiff and her husband were not ready and willing to perform their part of the contract. He strenuously argued to submit that 90% of the amount of consideration was paid and the plaintiff had no reason, not to be ready and willing to perform their part of the contract. There is specific pleading which is not disputed by the defendant. The plaintiff has satisfactorily explained the delay in filing the suit. No consent was obtained till 1991-92 and thereafter, the plaintiff's husband was suffering from heart ailment and he died in October, 1996. Thereafter, for the first time the defendant refused to perform her part of the contract. There are concurrent findings that time was not essence of

the contract and the suit was within the limitation. The plaintiff was put in possession, but it was lost at some point of time. The finding of learned First Appellate Court is perverse. He relied on following judgments ;

Panchanan Dhara Vs. Monmatha Nath Matty (dead); ¹ wherein it is held that;

“ when the time for specific performance is extended, the limitation to file suit starts running only when there is refusal by the defendant to perform the contract.”

In this case, the agreement by consent decree was dated 03/04/1979. There was several letters up to 1984 to execute the register sale-deed. There was finding that the performance of agreement was extended. The suit was filed in 1985 after refusal of performance by the defendant.

Rambhau Jagoji Gadre Vs. Shantabai wd/o Shankarrao Deshpande through his LRs. And another;²

The agreement was dated 24th November, 1979. The sale-deed was to be executed on 25th January, 1980. On 21st January 1980 the plaintiff had sent a telegram to the vender for execution of sale-deed. After notice dated 12th January, 1981 was not complied. The suit was filed on 16th April, 1982.

1 2006(5) Mh. L.J. 2009

2 2003(1)Mh.L.J., 791

***Trimbak Shankar Tidke Vs. Nivrutti Shankar Tidke*¹**

“In this case the entire consideration of Rs.7,000/- was paid but there was no specific averment regarding readiness and willingness and the court observed that such an amendment to incorporate the necessary pleading can be allowed.”

***Golden Dreams Arcade Pvt. Ltd. Aurangabad Vs. Shiv Embroidery Manufacturing Company, Mumbai*²**

The agreement was dated 16-8-2007 for the residual period of lease for a consideration of Rs.3,40,00,000/-. The appellant has admittedly paid the respondents a sum of Rs. 2,65,00,000/-. The appellant also tendered a further sum of Rs.25,00,000/- which the respondent did not accept and instead terminated the agreement by a letter dated 15-02-2008 i.e. within six months from the date of agreement. It was held that there was no breach on the part of the appellant.

***The reliance was placed on Ramlal and another Vs. Phagua and others*³**

It was observed in this case that the appellant court had not considered oral and documentary evidence properly. They mechanically confirmed the findings of the trial court. In such case the

1 1985 AIR (Bom)128;

2 2009(6) Mh. L. J. 454

3 (2006) 1 SCC, 168

High Court has liberty to re-appreciate the evidence and record its conclusion.

Reliance is placed on ***Damodar Lal Vs. Sohan Devi and others***¹ to submit that when there is perversity this Court should interfere and entertain the appeal.

Reliance was also placed on following passage defines perversity;

“The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is 'against the weight of evidence', or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.”

4. The learned trial court is with the plaintiff. The appellate court has also accepted the plaintiff's case on many points except with regard to readiness and willingness and discretion to grant specific

¹ (2016)3 SCC 78

performance. It is observed that since suit was filed after 20 years, the plaintiff was not ready and willing to perform his part of the contract and he was not entitled for specific performance.

5. The suit agreement dated 13/01/1984 itself provide that the sale-deed was to be executed within three months. No doubt there is evidence to show that, even beyond three months one payment was received in May, 1984. The evidence on record however, shows that from May 1984 to 1997 there was complete inaction for a period of 13 years on the part of plaintiff in taking steps for obtaining the sale-deed. Advocate Mr. Dewal argued that the plaintiff had claimed that he is ready and willing to perform his part of the contract and the same has not been denied in the written statement. Mr. Dewal heavily relied on the fact that 90% of the consideration amount was paid.

6. The defendant, with reference to para 6 of the plaint regarding readiness and willingness has denied the contents thereon. The continuous readiness and willingness has been specifically denied. It is also claimed that the deceased was asked several times to get the sale-deed executed but, he did nothing and kept on giving promises. It is claimed that since the transaction was not completed within time, it stood cancelled. It is claimed that suit was barred by limitation. There is no substance in contention that, there was no denial of readiness and willingness. The statute requires a continuous readiness and

willingness on the part of the plaintiff from the date of agreement till the date of suit and even thereafter. In the present case I find that, for a long period of 13 years from May, 1984 to February, 1997 there was complete inaction on the part of the plaintiffs husband and then the plaintiff in taking steps for completion of said transaction. There was no specific extension of date. Still even if it is assumed that the suit was within limitation, the plaintiff was not ready and willing to perform his part of the contract.

7. It is claimed that the consent of Collector was required but the plaintiff could have asked for specific performance subject to said condition and for that he was not required to wait.

8. Even if it is assumed that this can be a ground, still the said was over in 1991-92 and thereafter, the suit was filed almost Six years thereafter. There is no evidence to show that during this entire period, the plaintiff's husband was physically incapable of executing the sale-deed and this cannot be a ground to claim exemption from showing the readiness and willingness.

9. The payment of 90% amount will not absolve the plaintiff from showing continuous readiness and willingness on his part. Payment of 100% amount will absolve him which is not the case here. Mere averment in the pleading and in the evidence that the plaintiff was ready and willing to perform his part of the contract will not be statutory

compliance under Section 16(1)(c). The conduct of the plaintiff (in present case her husband) should disclose continuous readiness and willingness. It may not be necessary to pay the amount, but the complete inaction is unexplainable.

10. Though there was delay of 13 years, the first appellate Court wrongly held that it was of 20 years. Nevertheless, delay of 13 years is not small.

11. The various rulings cited before me do not involve similar facts of total inaction for a period of 13 years.

12. Even in case of readiness and willingness, it is well settled that the suit must be filed within a reasonable time. Mere readiness and willingness and filing the suit withing limitation will not suffice to claim the discretionary relief even in case where time is not hold essence of contract. In **Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa**,¹ in para 30 the Apex Court to resume all the previous apex court judgments and held that even when time is not essence of the contract, the suit for specific performance must be filed within reasonable time and then only court can exercise discretion under Section 20. In that case delay was six years, it was found to be unreasonable.

13. There are some mistakes on the part of the First Appellate

¹ AIR 2003 SC.,1399

Court, but finding that the plaintiff was not ready and willing to perform his part of the contract and that he was not entitled for discretionary relief cannot be said to be perverse.

14. There is huge unexplained delay of 13 years. This Court is bound to consider the totality of the circumstances and decide whether a substantial question of law is involved or not. Mere question of law is not enough, as held in ***Hiro Vinoth Vs. Seshmmal***¹ The question of law should be of such nature that it should go to the root of the matter and should be capable of up setting the finding of the lower Courts. In the light of the facts stated herein above, it is not possible to hold that any substantial question of law is involved.

15. In the result, the appeal deserves to be and is dismissed in limine.

[A. M. DHAVAL, J.]

¹ (2006)5 SCC 545