

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

Second Appeal No. 0211 of 2019

District : Aurangabad

1. Taher Ahmed s/o. Salim Ahmed,
Age : 55 years,
Occupation : Business,
R/o. Delhi Gate, Aurangabad,
Taluka & Dist. Aurangabad.
 2. Mohammad Rafiq s/o. Abdul Majid,
Age : 53 years,
Occupation : Business,
R/o. Osmanpura, Aurangabad,
Taluka & Dist. Aurangabad.
- .. Appellants
(Original
plaintiffs)

versus

Mohd. Yakub Khan s/o. Chand Khan,
Through legal representatives :

1. Mrs. Noorbee w/o. Mohd. Yakub Khan,
Age : 75 years,
Occupation : Household.
2. Mohd. Yasin s/o. Mohd. Yakub Khan,
Age : 58 years,
Occupation : Rickshaw Driver.
3. Mohd. Ilyas s/o. Mohd. Yakub Khan,
Age : 54 years,
Occupation : Agriculture.
4. Mohd. Moin Khan
s/o. Mohd. Yakub Khan,
Age : 42 years,
Occupation : Service.
5. Mohd. Azhar Khan
s/o. Mohd. Yakub Khan,
Age : 41 years,
Occupation : Service.

6. Ruksana d/o. Mohd. Yakub Khan,
Age : 88 years,
Occupation : Household.
7. Safia Khan w/o. Munnawar Khan,
Age : 50 years,
Occupation : Household.
8. Sultana w/o. Nawab Khan,
Age : 45 years,
Occupation : Household.

R/o. Peer Bazar Road,
Near Tara Pan Center,
Osmanpura, Aurangabad,
District Aurangabad.

.. Respondents
(Original
defendants)

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*Mr. Santosh G. Chapalgaonkar, Advocate, for the
appellants.*

*Mr. Milind M. Joshi, Advocate, for respondents
no.02 to 08 (caveator).*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01ST APRIL 2019

ORDER :

01. Present appeal has been filed by the original plaintiffs. They had filed Special Civil Suit No. 44 of 2008 before 4th Joint Civil Judge (Senior Division), Aurangabad, for specific performance of contract. The said suit came to be decreed on 19-03-2010. The original defendants challenged the said judgment and decree in Regular Civil Appeal No. 134 of 2016 and the said appeal came to be allowed on 17-01-2019 by learned District

Judge-13, Aurangabad. The judgment and decree passed by the learned trial Court was set aside. Special Civil Suit No. 44 of 2008 was partly allowed. Defendants were directed to refund the earnest amount to the extent of Rs. 3,50,000/- together with interest at the rate of 6 % per annum from the date of the suit till actual realization. Hence, this second appeal by the original plaintiffs. [Parties are referred as per their nomenclature before the trial Court.]

02. Heard learned Advocate Mr. S.G. Chapalgaonkar appearing for the appellants and learned Advocate Mr. M.M. Joshi appearing for respondents no.02 to 08 (caveators). Perused the the judgment and decree passed by both the Courts below. It is not even necessary to issue notice to the respondents.

03. It has been vehemently submitted on behalf of the appellants, that the learned first appellate Court did not consider the evidence and law point, especially the readiness and willingness, in proper perspective. On the same set of facts, learned trial Court had held that the plaintiffs were ready and willing to perform their part of the contract. But the same point has been negatived by the learned first appellate Court. In fact, it was not the stipulation of both the parties to treat time as

essence of the contract and, therefore, learned first appellate Court erred in denying the decree for specific performance but granting only the alternative relief of refund of earnest amount. Learned first appellate Court failed to consider that earnest amount was paid on the date of agreement to sell. The agreement was in respect of an agricultural land. Plaintiffs were the persons who issued notice to the defendants. Since they were having some questions in their mind, they had called upon the defendants to supply the information of those facts. However, the defendants gave evasive reply and unilaterally extended the period of specific performance. When the plaintiffs were having amount with them and they were ready to perform their part of the contract in respect of remaining amount of consideration, learned first appellate Court ought to have held that the plaintiffs were ready and willing to perform their part of the contract. Therefore, substantial questions of law are arising in this case.

04. The facts which are admitted are required to be considered first. Agricultural land bearing Gut no.56 admeasuring 03 hectares 44 R situated at Satara, Taluka & District Aurangabad, was owned and possessed by deceased Mohd. Yakub Khan i.e. original defendant who expired during the pendency of the suit. He had entered into an agreement to sell 01

acre out of the said land, on 23-08-2006 with plaintiffs for a consideration of Rs.70,00,000/-. Earnest amount of Rs. 3,50,000/- was given on the date of agreement. It was decided that the plaintiffs would pay balance amount of Rs. 66,50,000/- within four months from the date of the agreement (50 % by cash and 50 % by post-dated cheques of four months). Plaintiffs had agreed to bear the expenses of the sale deed. It was also decided that the defendant would rectify erroneous entry in 7/12 extract and would give possession of the suit land on the date of the sale deed. It is also not in dispute, that on 22-12-2016, plaintiffs issued notice to the original defendant, putting forward several queries and requesting defendant to extend the period of execution of the sale deed by a month. Defendant gave reply to the said notice and extended the period only by 15 days. It is also an admitted position, that from the date of notice reply till the date of suit, there was no attempt by the plaintiffs to tender the balance amount and get the sale deed executed.

05. Plaintiffs had come with a case, that when it was found by them that there is a question regarding marketability of the title of the suit property, they had asked the defendants to supply all those documents. So also, it was asked as to what is the area of outer limit considered as fragment under

the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. It was asked as to whether the suit land is ancestral or self acquired and whether the defendant is in possession of the land as tenant in common or after severance of status. Further questions in respect of succession or inheritance, encumbrance over the suit land, whether it is coming under yellow zone etc were asked; to which, there was no proper reply and defendant extended the time by 15 days without properly giving reply. It was contended by them, that they were ready and willing to perform their part of contract, however, defendant committed breach. It was also noted by them, that the defendant is negotiating with the third party to sell the said land and, therefore, plaintiffs had issued public notice in daily newspaper. Under the said circumstance, the suit for specific performance of the contract was filed, in which, alternative prayer for refund of earnest amount was made.

06. Defendant resisted the claim by filing written statement. It is stated that he got wrong entry in 7/12 extract in the name of Balkrishna Jagannath corrected on 29-09-2006 as per the terms in the contract. Since the plaintiffs were not ready and willing to perform their part of the contract, they issued false notice. The questions asked therein were not at all relevant at that point of

time. The notice was replied by him immediately and he extended the period of executing the sale deed by 15 days. Even during that period, plaintiffs did not pay the remaining amount of consideration. The time was essence of the contract as the defendant was facing financial difficulty. Every act was to be done within four months from the date of the agreement. Plaintiffs were interested to kill the time. He was ready and willing to perform his part of the contract and, therefore, had extended the period of execution of the sale deed by 15 days. However, plaintiffs did not perform their part of the contract and, therefore, plaintiffs have committed breach of the terms of the agreement. He had clearly indicated that if the plaintiffs do not perform their part of the contract within 15 days, then it would stand cancelled. Therefore, plaintiffs are not entitled to get relief of specific performance.

07. Here, learned trial Court has held that the plaintiffs were ready and willing to perform their part of the contract and the time was not essence of the contract and, therefore, the decree for specific performance was granted. All these points are reversed by the first appellate Court. The pleadings as well as the evidence which has been led on record would show that the defendant had decided to sell the said land as he was in dire need of money due to the marriage of his grand-daughter, construction of new

house and for the business of his sons. Therefore, he had specifically mentioned that the sale deed would be executed within four months from the date of the agreement. He has done his part of contract by getting the entry of one Balkrishna Jagannath deleted on 29-09-2006 itself. That means, when the agreement to sell was executed on 23-08-2006 and the name of Balkrishna Jagannath was deleted on 29-09-2006, that clears the side of the defendant that he was ready and willing to perform his part of the contract. It is interesting to note, as to which questions were put in the notice by the plaintiffs. They had asked as to what is the area which is legally transferable under Bombay Prevention of Fragmentation and Consolidation of Holdings Act. That means, they wanted to know whether agreement which was executed in respect of 01 acre would be hit as fragment under the said Act, or not. In fact, the information regarding the same ought to have been collected by the plaintiffs before entering into the agreement to sell.

08. An agreement as contemplated under the Contract Act is a legal contract and, therefore, if the performance of the same is to be sought, then everything should be legal. Without getting that information, if the plaintiffs had entered into contract, then it was at their own risk. Other questions which they posed were also the part of

enquiry; they ought to have done prior to entering into agreement to sell. They are, whether the suit land is ancestral property or self acquired property of the defendant; whether the original defendant was in possession of the suit land as tenant or in common or by severance of joint status; whether he got the property in succession or by acquisition. Even the extract of record of rights was also called upon, in order to ascertain encumbrance on the suit land; whether the suit land is in yellow zone in the development plan, etc. It has been rightly observed by the learned first appellate Court, that the parties are Muslims and, therefore, there was no question of property being ancestral. If the prospective purchaser does not collect the necessary information before entering into agreement to sell and then makes enquiry by way of issuing notice, that too, on the last day of performance contemplated under the agreement, then it cannot be said that he has *bona fide* intention. Another fact that is also required to be considered is that the said notice was replied by the defendant and he had unilaterally extended the period of execution of the document with a clear understanding that if the plaintiffs fail to perform their part of the contract, then the contract would be treated as cancelled. In spite of this clear understanding, the plaintiffs did not approach the defendant with the balance amount of consideration.

09. As regards the time was essence of the contract is concerned, witness for the plaintiffs has clearly admitted that he had knowledge about the reason for which the defendant is selling the land. It was also clear from the fact that in the notice reply, defendant again clarified that the time is essence of the contract and then extended the time with a specific condition that the plaintiffs should perform their part of the contract. Merely by saying that the defendant has given evasive reply, the plaintiffs cannot get any benefit. As regards readiness and willingness is concerned, learned first appellate Court has reappreciated the facts and evidence and went on to consider as to how much was the balance amount with the plaintiffs on the proposed date of execution of the sale deed. How the queries put by the plaintiffs were wrong, has also been discussed in detail by the learned first appellate Court. Therefore, taking into consideration the reasons given by the first appellate Court, it can be definitely said that the discretion has been exercised properly and judiciously, which was not exercised by the learned trial Court. Therefore, taking into consideration the judgment and decree passed by the learned first appellate Court, no substantial question of law is arising so as to admit the second appeal under Section 100 of C.P.C.

10. In the light of above, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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