

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

SECOND APPEAL NO. 665 OF 2018

1. Shri. Suresh Bhalchandra Nagarkar
Age : 58 years, Occ. : Service

2. Sou. Swati Suresh Nagarkar
Age : 42 years, Occ.: Household,

Both R/at : Shweta Gruh Nirman
Sanstha Maryadit, Jalochi,
Taluka Baramati, District Pune

.... Appellants

Vs.

Sou. Baby Jaywant Shinde
Age : 55 years, Occ.: Service,
R/at Bachat Bhavan, in front of
Sharada Sabhagruh, Kasba,
Baramati, District Pune

.... Respondent

Mr. Avinash B. Avhad for Appellants.
Ms. Savita A. Prabhune for Respondent no.1.

CORAM : S.C. GUPTE, J.

DATE : 11 MARCH 2020

ORAL JUDGMENT :

1. Heard learned counsel for the parties.
2. This Second Appeal challenges a judgment passed by the District Court at Baramati, District Pune in Regular Civil Appeal.

3. The Respondent herein was the original plaintiff, who had filed the suit against the Appellants herein (original Defendants) for specific performance of a contract for sale of immovable property executed by the Defendants in favour of the Plaintiff.

4. The Plaintiff relied on a written agreement for sale executed by the Defendants in her favour on 9 July 2007, which was a registered agreement and her readiness and willingness to perform her part of the agreement as per the terms of the agreement. The Plaintiff alleged that the Defendants refused to perform the agreement. The Defendants filed a written statement contesting the suit. The Defendants' case in the written statement was that the amount paid by the Plaintiff to the Defendants, and which was reflected in the agreement, was a hand-loan; the agreement was in the nature of security. It was submitted that the defendants had repaid the loan amount of Rs.30,000/- to the Plaintiff with interest and yet the Plaintiff had proceeded to file a false suit seeking specific performance of the contract.

5. The Trial Court did not accept the Defendants' theory of hand-loan or its repayment. The lower appellate Court concurred with the trial Court and held the agreement to be a contract for sale of immovable property.

6. No fault can be found with concurrent findings of two Courts below in favour of the Plaintiff. There is no perversity or unreasonableness in the findings. The findings are supported by some evidence; the Courts below have taken into account all relevant and germane circumstances and materials, and have not considered any irrelevant or non-germane material or circumstance. No substantial question of law arises for the determination of this Court accordingly.

7. It is alternatively submitted by learned counsel for the Appellants (original Defendants) that the suit agreement provided for a specific time of three months for completing the sale. It is submitted that time, having been specifically mentioned in the agreement, was of essence. It is submitted that, in the first place, despite the Defendants' specific plea, no such issue was framed by the trial Court, much less decided. Learned counsel relies on the case of **I.S. Sikandar (D) by LRs. Vs. K. Subramani & Ors**¹, and submits that time having been specified in the agreement, it ought to be treated as of essence.

8. There is no merit in this submission either. The trial Court did not frame any issue of time being of essence, since there was no such plea on the part of the Defendants. The lower appellate Court noted this in its impugned order. In paragraph 15 of the order, the lower appellate Court quoted the only plea in this behalf to be found in the Defendants' written statement. The plea noted by the lower appellate Court suggests that time of three months provided for in the

¹ 2013 DGLS (SC) 696

agreement was referred to only in the context of veracity of the Plaintiff's case that the agreement was a contract for sale of immovable property. There was indeed no specific defence, as observed by the lower appellate Court, on the part of the Defendants that having regard to the nature of the contract between the parties, time was of essence.

9. The trial Court has particularly noted that apropos the time of three months given to the Plaintiff to arrange the remaining consideration, there was a deposition by the Plaintiff in her cross-examination that she had been to the Defendants alongwith funds comprising of the remaining consideration after two months of the execution of agreement for sale, but the Defendants had refused to accept the amount. The Plaintiff had also deposed that at the expiry of three months, she had not issued or directed any notice to the Defendants, as the latter were asking her to wait for sometime. The Court accordingly held that it was clear from the material placed before it that there was no unreasonable delay on the part of the Plaintiff in payment of balance consideration. This again is clearly a pure question of fact. The conclusion of the Court, which was confirmed by the lower appellate Court, is supported by some evidence. It does take into account all relevant and germane materials and circumstances and does not consider any irrelevant or non-germane material or circumstance. The order clearly exhibits a possible view and cannot be termed either as perverse or unreasonable.

10. The judgment of **I.S. Sikandar** (supra) cited by learned counsel for the Appellants does not support the Appellants' case. The judgment merely asserts the legal principle under Section 55 of the Contract Act. As noted by the Supreme Court in that case, the position of law is well settled that in case of sale of immovable property, time is not of essence of the contract, except when the parties agree to a specific time in the agreement and it unmistakably emanates from the contract that such time could be said to be of essence. In fact, as the Supreme Court noted in this judgment, even where the parties have expressly provided that time would be the essence of the contract, such stipulation has to be read alongwith other provisions of the contract. The Court has to take a view on this issue, after reading the contract as a whole and in the light of pleadings of the parties. It cannot be said in the present case that merely because the document refers to three months' period as the period for completion of sale, time must be taken to be of essence. In the first place, besides mentioning of the period of three months, there is nothing in the agreement to indicate that time was of essence. Secondly, and at any rate, that was not the defendants' plea in the written statement. The defendants' case was not that they were entitled to terminate the suit contract or treat the same as voidable at their option for non-payment within time. Their case was that the agreement was not a contract for sale of immovable property; the transaction was of a mere hand-loan, which was repayed by the defendants. This case was found by the Court below against the Defendants. Thirdly, the conclusion of the Court that time was really

not of essence was also based on its observation that the Defendants had not cancelled the agreement or informed about its voidability. This was also an instance to show that time was not really of essence.

11. In the premises, the subject of time being of essence, also does not raise any substantial question of law for consideration of this Court.

12. There is accordingly no merit in the Second Appeal. The Second Appeal is dismissed.

13. In view of the dismissal of the Appeal, the Civil Application does not survive, and is accordingly disposed of.

(S.C. GUPTE, J.)