

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

SECOND APPEAL NO. 620 OF 2018

- 1] Shri Umashankar Ramnath Singh,
aged adult, Occ. Business,
Residing at F Cabin,
Shivpuram Apartment,
Katemanvli, Kalyan (E)
Dist. Thane
- 2] Shri Ramkumar Shardaprasad Singh,
aged about 43 years, Occ. Business,
Residing at : 13, F Cabin,
Shivpuram Apartment,
Katemanvli, Kalyan (E)
Dist. Thane
- 3] Shri Ramesh Ambikaprasad Mishra,
aged adult, Occ. Business,
Residing at : 603, A/1 Wing,
Shreyb Palace, Santoshi Mata Mandir
Road, Opposite Adarsh Hindi High School,
Rambag, Kalyan (W)
Dist. Thane

Appellant No.3 is for self land for
Appellant No.1 & Appellant No.2, the
Appellant No.3 is P.A holder

APPELLANTS

...VERSUS...

1. Smt. Sakhubai Shankar Alimgharkar,
Aged about : 65 years, Occ. Housewife,
Residing at : Kansai Gaon,
Taluka : Ulhasnagar, Dist. Thane.
2. Shri Madhukar Chintaman Yeshwantrao,
Aged about : 48 years, Occ. Business,
Residing at : Darshana Niwas, Shivaji Nagar,
Waldhuni, Kalyan (East), Taluka : Kalyan,
Dist. Thane...
3. Shri Sameep Rajaram Kale,
Aged about : 35 years, Occ. Business,

Residing at : Om Sunrise Co-operative
Housing Society Limited, 1st Floor,
Room No.4, Shivaji Nagar, Waldhuni,
Kalyan (East), Taluka : Kalyan,
Dist. Thane.

4. Shri Vinod Lalsingh Thakur,
Aged Adult, Occ. Business,
Having address at Malhar Sankul,
Near Mohindersingh Kabulsingh School,
Kalyan (West), Taluka : Kalyan,
Dist. Thane.
5. M/s. Shreeji Krupa Builders,
An partnership firm through its Partner
Shri Yashwant V. Garud,
Age : Adult, Occ. Builder, Developer and
Contractor, having address at Malhar Sankul,
Near Mohindersingh Kabulsingh School,
Kalyan (West), Taluka : Kalyan,
Dist. Thane.
6. Konark Infrastructure Limited,
through its Director,
Shri Suresh Ratanlal Jagyasi,
Aged about : 40 years, Occ. Business,
Residing at : 1st Floor, Konark Plaza,
Sapna Talkies, Near Sapna Garden,
Ulhasnagar, Dist. Thane
7. Dena Bank, Dena Bank Corporate Centre
Flat No. C-109, G-Block,
Bandra-Kurla Complex, Bandra,
Mumbai : 400 051, Ulhasnagar,
Sector 2 Branch, Furniture Bazar,
Ulhasnagar - 421 002
8. Konark Nirman Private Limited,
Manohar Palace, 1st Floor,
Sapna Garden, Ulhasnagar.....

RESPONDENTS

Adv. Girish S. Godbole i/by Dahibawkar and Co. for appellants.
Adv. Rahul Nerlekar for Respondent No.5
Adv. Akshaya K Puthran i/b y S.K. Singhi and Co. for Respondent No.7
Adv. Anish Khandekar for Respondent No.8

CORAM: N.W.SAMBRE, J.
JUDGMENT RESERVED ON : 7th JANUARY, 2020.
JUDGMENT PRONOUNCED ON : 4th MAY, 2020.

JUDGMENT

1] This second appeal is under Section 100 and Order 41 of Code of Civil Procedure by the original plaintiffs.

2] The claim in the suit was for specific performance of contract, cancellation, declaration and injunction based on an unregistered agreement dated 8th February, 1996.

3] Respondent Nos. 1 and 2 are original Defendant Nos. 1 and 2 who were owning the suit property land bearing Survey No. 21, Hissa No. 6(part), admeasuring 254.54 sq.mtrs., and Survey No. 21, Hissa No.6 (part), area admeasuring 254.30 sq.mtrs., situated at Mouje Chikanghar, Taluka Kalyan, Dist. Thane.

4] The aforesaid suit property was agreed to be sold through a Development Agreement executed on 8th February, 1996. The appellants claimed to have received possession of the suit property by virtue of Clause 4 of the agreement. According to the appellants, out of total agreed

consideration of Rs.8.50 lakhs, the respondent Nos. 1 and 2 have agreed to have received an amount of Rs.4.25 lakhs i.e. 50% of the total consideration. It is claimed that the respondents were duty bound to measure the land through Revenue Authorities and also to provide approach road after which the sale deed was to be executed. According to the appellants, since 2008 to 2011 he was not keeping well as was suffering from cancer, the respondent Nos. 1 and 2 have created third party interest in favour of the other respondents thereby frustrating the claim. As such the suit claim.

5] The trial Court partly decreed the suit, thereby directing defendant Nos. 1 and 2 to refund the amount of Rs.4,25,000/- along with 12% interest from the date of suit till the date of realization.

6] The appellant feeling aggrieved preferred appeal being Appeal No. 62 of 2016, which was dismissed by the learned District Judge vide judgment and order dated 23rd March, 2018. As such this second appeal.

7] Shri Godbole, learned counsel appearing for the appellants/original plaintiffs would urge that readiness and willingness of the appellants to perform their part of contract have to be inferred from the recitals of the agreement dated

8th February, 1996. According to him, the part payment of the consideration of Rs.4.25,000/- from time to time and handing over of possession to the present appellants speaks voluminous about the intention of the appellants to perform their part of contract. Based on the provisions of sub-section (c) of Section 16 of the Specific Reliefs Act, Shri Godbole would urge the following question of law.

Whether both the Courts below have committed error apparent on the face of record in recording and finding that appellant was not ready and willing to perform his part of contract?

8] Shri Godble would further urge that the Courts below have recorded an incorrect finding of fact on the issue of the description of the suit property, terming same to be vague. According to him, Clause 4 of the agreement in categorical terms speaks of handing over of possession to the appellants and in absence of a lawful dispossession of the appellants by the defendant Nos. 1 and 2, the rest of the respondents who are stake holder in the suit property cannot claim that they were put in possession by the respondent Nos. 1 and 2.

9] Apart from above, Shri Godbole would urge that Article 54 of the Limitation Act prescribes 3 years of limitation from the date of termination. According to him, the appellants were not in consistent possession of the suit property and in 2011 after the appellant No.1 was discharged from the Hospital, he having noticed that rest of the respondents are executing certain civil work, based on the said cause, the suit came to be initiated on 16th January, 2011. As such, according to him, the appeal warrants consideration.

10] The learned counsel for the respective respondents would oppose the aforesaid submissions. According to the respondents, apart from the concurrent findings recorded by both the Courts below, the findings of possession are answered against the appellants.

11] With the assistance of the respective learned counsel, I have perused the entire record made available by the parties.

12] Based on the rival claims of the parties, the trial Court framed issues at Exh.89. After the amendment carried out by the parties, the issues were recasted at Exh.227. The issues as were dealt with and answered are as under;

Issues	Findings
1] Whether the plaintiffs prove that defendant no. 1 and 2 executed agreement dated 08/02/1996 in their favour before the Public Notary?	In the affirmative
2] Whether plaintiffs prove that defendant executed irrevocable power of attorney in their favour on 15/2/1996?	In the affirmative
3] Whether plaintiffs prove that defendant nos. 1 and 2 agreed to sold suit property to them for total consideration of Rs.8,50,000/-?	In the affirmative
4] Whether plaintiffs prove that defendant received part consideration of Rs.4,25,000/-?	In the affirmative 、
5] Whether plaintiffs prove that defendant nos. 1 and 2 handed over possession of suit property to them as per the agreement between them?	In the negative
6] Whether plaintiffs prove that they were and are ready to perform their part of contract?	In the negative
7] Whether plaintiffs prove that on 10/11/2011 defendant No.6 with the help of labours started excavation work in the suit property?	In the negative
8] Whether plaintiffs prove that defendant No.6 during the pendency of the suit illegally taken possession of suit property from them?	In the negative
9] Whether plaintiffs prove that defendants inter se entered into various deed of conveyance behind their back with intention to defeat their rights in the suit property?	In the negative

10] Whether defendant No. 6 proves that plaintiff in collusion with defendant nos. 1 and 2 prepared false agreement with intention to extract money from them?	In the negative
11] Whether the suit is bad for non-joinder and mis-joinder of parties?	In the negative
12] Whether the suit is bad for want of cause of actions?	Already decided
13] Whether the suit is bad for mis-joinder of cause of actions?	In the negative
14] Whether the suit is within limitation?	Yes
15] Whether plaintiffs prove that they are entitled for relief of specific performance of an agreement dated 08/02/1996 as prayed?	In the negative
16] Whether plaintiffs are entitled for the declaration as prayed for?	In the negative
17] Whether plaintiffs are entitled for perpetual injunction as prayed for ?	In the negative
18] Whether plaintiffs are entitled for relief of possession as prayed for?	In the negative
19] What order and decree?	As per final order
20] Whether the suit is maintainable against defendant No.6?	Already decided
21] Whether the suit is bad for mis-joinder of cause of actions?	Deleted
22] Whether the suit is barred in view of section 149 of Maharashtra Regional Town Planning Act?	Already decided

23] Whether defendant No.6 proves that defendant is developing the suit property and they are in possession of it?	In the affirmative
24] Whether the suit is barred by provisions of delay, laches and acquiescence?	In the negative
25] Whether defendant no.8 proves that he has bonafide purchaser of value without notice?	In the affirmative
26] Whether the plaintiff has property valued the suit?	Already decided

13] As far as the question of law as is sought to be canvassed by Shri Godbole is concerned i.e. on the issue of the possession and the readiness and willingness of the appellant to discharge his part of contract, it is worth to note that Clause 4 of the agreement entered into speaks of agreement between the parties to execute general power of attorney in favour of the appellant by the respondent Nos. 1 and 2 at the time of receiving of second installment. It is also mentioned therein that the respondents will hand over the possession of the suit property to the second party.

14] As has been observed hereinabove that with the assistance, I have perused the record, it is impossible to infer that the appellant has established their possession over the suit property. No specific details of receiving possession

from the respondents 1 and 2 i.e. original defendants 1 and 2 is spelt out in the evidence so as to infer that respondent Nos. 1 and 2 have handed over the possession to the appellants of the suit property pursuant to the compliance of ingredients of Clause 4 of the agreement. The appellant has not been able to demonstrate as to when the second installment was paid and as to mode and manner of handing over possession by the respondents to the appellants, particularly date and time. Even otherwise, there is no other documentary evidence on record to infer possession of the appellant over the suit property. In the aforesaid background, the claim of Shri Godbole that the appellants were put in possession of the suit property and their dispossession so as to hand over the possession to respondent No.3 onward is not proved cannot be accepted and is as such liable to be rejected.

15] This takes me to the next submission of Shri Godbole as regards the readiness and willingness of the appellant to perform his part of contract.

16] Admittedly the appellant in his pleading has made a statement that he is ready and willing to perform his part of contract. However, that by itself is not sufficient to prove his readiness and willingness. It was incumbent on the

part of the appellant to prove that he has timely discharged his obligation under the contract which he was bound to and for all the times to come he was ready and willing from the date of execution of contract to perform his part. The suit which is based on Exh.138 i.e. agreement to sell speaks of payment of total agreed consideration of Rs.8,50,000/-, out of which it is claimed that an amount of Rs.4,25,000/- was already paid. Amongst others, the term was the respondents were to carry out the measurement of the suit property through D.I.L.R., which they have duly carried out.

17] From the record, it came to be observed that, there was serious doubt as to whether the appellant was to have access road from the respondents. Be that as it may, the readiness and willingness is sought to be established from the evidence of the plaintiff's witness Ramesh. In his cross examination, he has specifically admitted that from the date of the agreement i.e. 8th February, 1996 till the date of filing of the suit i.e. in 2012, neither a single letter nor a notice was issued to the defendants calling upon them to perform their part of contract.

18] The appellant has claimed that appellant No.1 was not keeping well from 2008 to 2010 and as such he could not protect his possession over the suit property. The

appellant has failed to provide any medical evidence to establish that he was not keeping well for the said period i.e. from 2008 to 2010. This Court cannot be oblivious to the fact that the agreement is of 1996 and till 2008 no steps were taken by the appellant-plaintiffs so as to take the agreement to its logical end.

19] In the aforesaid background, the claim of the appellant that he was ready and willing to perform his part of contract and both the Courts below have committed an error in not recording finding that Appellant has complied with requirement under Section 6 of the Specific Relief Act is not at all established and the same was rightly rejected by the Courts below.

20] In the backdrop of the aforesaid reasons, the present second appeal which is arising out of concurrent findings does not bear any merit and is accordingly dismissed.

JUDGE