

Wakodikar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 623 OF 2018
ALONGWITH
CIVIL APPLICATION NO. 1440 OF 2018**

Dinesh Chagganlal Patel	..Appellant.
V/s.	
Shri. Deven Vijay Jadhav	..Respondent.

.....
Mr. Uday P. Warunjikar for the Appellant.

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CORAM: NITIN W. SAMBRE, J.

DATE : 20th JANUARY, 2020

P.C.:-

This appeal is filed by Defendant in Special Civil Suit No.83 of 2010, initiated by the Respondent/Plaintiff in the Court of Civil Judge, Senior Division, Vasai for specific performance, possession and perpetual injunction. The suit came to be decreed vide judgment and order dated 13th February, 2014. Feeling aggrieved, the appellant preferred an appeal under Section 96 of the Code of Civil Procedure, being Civil Appeal No.1 of 2015 on the file of Extra Joint district Judge, at Vasai. The First Appeal preferred by the appellant came to be dismissed on 16th April, 2018. As such, this Second Appeal.

2. Heard Shri. Warunjikar, Learned Counsel for Appellant.

While inviting the attention of this Court to the issues framed before the Trial Court and the points which were considered before the Appellate Court, the submissions are, both the Courts below, have committed an error on the face of record in decreeing the suit as time was essence of the contract and the amount of consideration was not received/paid to the appellant within the time stipulated. As such, the question of law which is sought to be raised;

“whether the time was essence of contract and the Court below have committed an error in answering the said issue in negative ?”

3. The appellant claimed to be owner of the suit property consisting of a flat which was agreed to be sold for a consideration of Rs. 5,10,000/- and a registered agreement came to be executed on March 11, 2008.

4. At the time of agreement, an amount of Rs.65,000/- was paid and balance amount of Rs.4,45,000/- was agreed to be paid from the loan to be arranged by Respondent/Plaintiff from the financial institution.

5. Respondent/Plaintiff claimed to have paid, from time to time, an amount of Rs.2,21,000/- out of total consideration of

Rs.5,10,000/-. As the amount of Rs.2,89,000/- of balance consideration was not paid, it is claimed that the respondent has failed to honour the terms of the agreement.

6. Considering the defence put forth by the Appellant/Defendant, issues were framed at Exh.22 which reads thus :

ISSUES

- (i) Does the plaintiff prove that he was and is ready and willing to perform his part of contract ?
- (ii) Does the plaintiff prove that it was agreed between him and defendant that defendant will hand over NOC of society and provide original documents ?
- (iii) Does the defendant prove that time was essence of contract ?
- (iv) Is plaintiff entitled for relief prayed for ?
- (v) Is plaintiff in alternative entitled for damages of Rs.5,00,000/- ?
- (vi) What order and decree ?

7. The Respondent/Plaintiff examined himself at Exh.26 and a Bank official – PW2 at Exh.39. Plaintiff has also placed on record the Agreement of Sale – Exh.30, loan sanction letter – Exh.31, Notice issued to the Appellant – Exh.32 dated June 4, 2009 calling upon him to execute the Sale Deed in terms of contract entered into at Exh.30, reply – Exh.33 to notice – Exh.32 etc.

8. After appreciating the evidence of respective parties on

record, the Trial Court noticed that the Agreement of Sale – Exh.30 particularly the point No.3 at page No.3 provides for availing loan facility from a financial institution and balance consideration was to be paid within 30 days of the date of agreement. Thereafter, it was agreed between the parties that after receipt of entire consideration, the Appellant/Defendant, would hand over the possession of the suit flat to Respondent/Plaintiff. The loan sanction letter – Exh.31 is in the form of an offer of sanction of maximum loan of Rs.5,00,000/- against the salary slip. The evidence of PW-1 and PW-2 speaks of that the amount was almost ready to be handed over to the Appellant towards consideration. Amongst other formalities, which were to be completed, was the appellant obtaining the certificate from the society in which the flat is located. To prove that the time was essence of the contract, the burden was on the Appellant and it is noticed that the Appellant has not discharged the said burden. Based on the conduct of the parties to the suit, the Trial Court has rightly recorded that time was not essence of the contract.

9. The Appellate Court, while dealing with the said issue in para 12, has observed that the conduct of the Appellant in accepting the amount from time to time, is failure to discharge the onus of proving the fact that time was essence of contract, has proceeded to confirm the

finding recorded by the Trial Court, thereby decreeing the suit.

10. In my opinion, both the Courts below, have rightly held that the time was not essence of the contract as the Appellant failed to discharge the said onus.

11. As such, the present second appeal against the concurrent findings does not hold any substance, same lacks merit and is dismissed.

12. In view of dismissal of second appeal, pending applications also stand disposed of.

(NITIN W. SAMBRE, J.)