IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 235 OF 2018

Appellant (Orig. Plaintiff)	Basheer Ahmed Noor-ul-Hussain Farooqui Age: 66 years, Occu: Business, R/o. Dukhi Nagar, Old Jalna, Tq. &Dist. Jalna.
VERSUS	
Respondent (Orig. Defendant)	Shaikh Hamad S/o Shaik Sahal Age: 61 years, Occu: Business, R/o. Dukhi Nagar, Old Jalna, Tq. &Dist. Jalna.

Advocate for the Appellant: Mr. Shaikh Mujtaba Gulam Mustafa
Advocate for the Respondent-Sole: Mr. M. K. Deshpande

CORAM : AVINASH G. GHAROTE, J.

JUDGMENT RESERVED ON : 19.06.2021
JUDGMENT PRONOUNCED ON : 23.06.2021

JUDGMENT : (AVINASH G. GHAROTE, J.)

1. Heard. Rule. Rule returnable forthwith. The following substantial questions of law arises for consideration.

> “a) Whether the benefit of Section 14 of the Limitation Act, 1963 were available to the plaintiff considering, that he was prosecuting remedies under the Consumer Protection Act, 2019 in respect of the agreement in question ?

b) Whether time was of essence of contract ?

c) What is the scope and ambit of Section 16 (c) of the Specific Relief Act, 1963 ?

2. I have heard the learned counsel for the parties on the above substantial questions of law. The entire paper book alongwith the exhibited documents have been placed on record and therefore, there is no need to call for the Record and Proceedings.

3. The present appeal challenges the concurrent findings rendered by the courts below, holding that Section 14 of the Limitation Act, was not applicable and therefore, the suit for specific performance as filed by the appellant/plaintiff, was barred by limitation and so also the findings, that the plaintiff was not ready and willing to perform his part, as time was the essence of contract. The parties are referred hereto in the same nomenclature as they were before the trial court.

4. Facts giving rise to the present appeal are as under:

Sr. No.	Date	Event
01.	04.04.2006,	The defendant owner of immovable property bearing Plot No.42 admeasuring 187.00 sq. mtrs. situated at Jalna along with construction thereupon, entered into an agreement to sell, the same to the plaintiff for a consideration of Rs.6,50,000/- out of which Rs.4,50,000/- was

		paid on the date of the agreement of sale itself by two cheques and the balance amount was agreed to be paid within eight months, whereupon, the sale deed was to be executed and registered. The agreement of sale was duly registered with the Sub-Registrar, Jalna at Sr. No.714-2006. Possession of four rooms, including lavatory, bathroom and open site stood delivered to the plaintiff on the date of the agreement of sale. Possession of remaining three rooms were to be handed over upon receipt of balance consideration and execution of sale deed. At the time of agreement, the suit property was mortgaged with the Buldhana Urban Co-operative Credit Society, vide Mortgage Entry No.1776.
	04.10.2006,	Notice was issued by the plaintiff to the defendant calling upon him to execute the sale deed upon receipt of balance consideration.
	14.11.2006,	Reply by defendant stating, that defendant was ready.
	01.12.2006,	Plaintiff approached District Consumer Forum, Jalna against defendant, seeking execution and registration of sale deed.

	30.03.2007	District Consumer Forum allowed claim of the plaintiff directing defendant to execute sale deed and deliver the possession of balance area upon receipt of balance consideration.
	04.01.2010	Appeal by defendant to State Commission, Mumbai (Appeal No.326/2009) was allowed and plaintiff was granted liberty to approach Civil Court.
	14.03.2011	Plaintiff preferred Revision No.961 of 2010 before the National Commission, which was dismissed.
	13.04.2011	Suit for specific performance (Special Civil Suit No.68 of 2011) filed by plaintiff before the learned Civil Judge, Senior Division, Jalna.
	07.03.2007,	In the meantime, Khalid Shaikh (Son of defendant) and Smt. Asha Begum (Wife of defendant) filed RCS No.83 of 2007 before Civil Judge, Senior Division, Jalna seeking permanent injunction against the present plaintiff and defendant with an intention to cause obstruction to execution of sale deed in favour of the plaintiff.
	03.07.2007	RCS No.83/2007 withdrawn.
	22.06.2006	The mortgage with the Buldhana Urban Credit Co-operative Society stood released according to the defendant. As per the plaintiff the date of release was 21.03.2007.

5. The agreement of sale dated 04.04.2006 and its terms and conditions, the issuance of the notice dated 04.10.2006 and the reply dated 14.11.2006 stand admitted. So also, the filing of RCS No.83 of 2007 and its withdrawal also stand admitted.

6. Mr. Mustafa, learned counsel for the appellant contends, that the findings of the learned trial court that the plaintiff failed to prove his readiness and willingness as the balance consideration of Rs.2,00,000/-, was not paid within the period of eight months from the date of the agreement, and on this count, the agreement stood automatically canceled, are not sustainable on the face of the record. He submits, that insofar as the plea regarding applicability of Section 14 of the Limitation Act, 1963, the finding that since the suit had been filed in the year 2011, the factum, that the plaintiff was prosecuting proceedings before the Consumer Forum and the State Commission, would not enure to the benefit of the plaintiff, as he was aware that no service had been rendered to him by the defendant, by the trial court, is *perse* illegal and without any substance whatsoever and the plaintiff was entitled to the benefit of Section 14 of the Limitation Act. He submits, that the readiness and willingness is demonstrated by the fact that major part of the consideration already stood paid on the date of the agreement of sale itself and the issuance of the notice dated 04.10.2006. He submits, that to demonstrate readiness and willingness, it is not necessary for the plaintiff

to have a ready-made scheme of finance. Insofar as time being of the essence of contract, he submits, that the property was mortgaged with the Buldhana Urban Credit Co-operative Society and it was for the defendant to get it cleared. He submits, that it was therefore necessary for the defendant to produce a No Dues Certificate from the Buldhana Urban Credit Co-operative Society in this regard as the same was necessary for the execution and registration of the deed of sale, in order to transfer a clear title. Time according to him, in respect of an agreement of immovable property cannot be of the essence of contract. He therefore submits, that the impugned judgment holding otherwise cannot be sustained in the eyes of law and are required to be set aside and suit decreed. He placed his reliance upon **Laxmi Engineering Works Vs. P. S. G. Industrial Institute, AIR 95 SC 1428; Saushish Diamonds Ltd. Vs. National Insurance Company Ltd., 1998 (8) SCC 357; M/s Deokar Exports Pvt.Ltd. Vs. New India Insurance Company Ltd., AIR (1) Bombay 327** and **Shangrilla Apartments Co-Operative Housing Society ltd. Vs. M/s. Rivin Builders, 2016 (2) ALL MR136.**

7. Mr. Deshpande, learned counsel for the defendant submits, that time was of the essence of contract as the period of eight months, was specifically agreed, within which the balance consideration was to be paid, which according to him, the plaintiff failed to do, in spite of the fact that on 22.03.2006 itself, the encumbrance upon the property was

removed, in view of which, the insistence of the plaintiff to have a No Due Certificate was not justified and since the plaintiff did not pay the balance consideration, in spite of the defendant being ready to excute and register the deed of sale upon the receipt of balance consideration as was reflected from the reply dated 14.11.2006, the agreement stood automatically canceled. He further submits, that the plaintiff is not entitled to the benefit under Section 14 of the Limitation Act, as throughout the plaintiff was aware, that no service was being provided by the defendant and therefore, the question of approaching the Consumer Forum did not arise at all. On the point of Sections 16 (c) and 20 of the Specific Relief Act, learned counsel relies upon **Vidyanadam Vs. Vairavan, 1997 (3) SCC 1**, and **Sardamani Kandappan Vs. S. Rajalakshmi, 2011 (12) SCC 18**. On the point of Section 14, learned counsel relies upon **Ramji Pandey &O Ors. Vs. Swaran Kali, 2010 (14) SCC 492**. Learned counsel further submits, that as concurrent findings of facts have been rendered, it is not permissible for this Court to interfere for which he relies upon **Kamal Kumar Vs. Premlata Joshi & Ors., 2019 (3) SCC 704**.

8. Insofar as the plea, regarding applicability of Section 14 of the Limitation Act is concerned, it mandates exclusion of time spent proceeding bonafide in Court without jurisdiction, which the plaintiff had been prosecuting with due diligence. It is not in dispute, that the period of eight months as provided for in the agreement dated 04.04.2006 was

to come to an end on 03.12.2006. It is also not in dispute, that on 27.11.2006, the plaintiff had given a notice expressing his readiness and willingness to pay the balance consideration and to get the sale deed executed and registered. It is also not in dispute, that on 01.12.2006, the plaintiff approached the District Consumer Forum, which allowed his claim on 3.3.2007. It is thus material to note, that the District Consumer Forum, had entertained the plea of the plaintiff for a direction to the defendant to execute the sale deed upon the receipt of the balance consideration and had issued an according direction. It is quite another matter altogether, that the State Commission by its order dated 04.01.2010, dismissed the claim of the plaintiff and directed him to approach the Civil Court which order was confirmed by the National Commission on 14.03.2011 immediately after which the plaintiff approached the Civil Court on 13.04.2011 with the suit for specific performance. The very fact that the District Forum, had ruled in favour of the plaintiff would indicate that the plaintiff had prosecuted the remedy before the Consumer Forum diligently and bonafidely. In a series of decisions, namely, **Laxmi Engineering Works; Saushish Diamonds Ltd.; M/s Deokar Exports Pvt. Ltd.** and **Shangrilla Apartments Co-Operative Housing Society ltd** (Supra), it has been held, that prosecution of a remedy before the Consumer Forum, would be a legal and valid ground, to invoke and apply the provisions of Section 14 of the Limitation Act.

There is no reason whatsoever, why the same benefit, cannot be granted to the plaintiff, specifically in light of the fact, that the District Consumer Forum in fact entertained the plea of the plaintiff and had granted relief. It therefore cannot be said that prosecution of the remedy by the plaintiff before the authorities under the Consumer Protection Act was either malafide, or with knowledge that the same was not maintainable. **Ramji Pandey** (Supra) upon which reliance has been placed by Mr. Deshpande, learned counsel for the respondent, is on a different footing altogether as in that case, the initial institution of the suit itself, was in the proper forum that is the Civil Court and it was not a case where at the inception, the proceedings were filed and prosecuted in a forum which subsequently was held to be without authority. The courts below, have failed to consider the above position, in light of the settled position of law, and therefore, the finding in this regard, cannot be sustained. It is therefore held, that the suit as filed by the plaintiff, was maintainable in view of the availability and applicability of Section 14 of the Limitation Act, to the plaintiff, for if the period spent before the Consumer Forum and the Higher Authorities under the Consumer Protection Act was subtracted, then the suit filed by the plaintiff, was clearly within the limitation as prescribed under Section 54 of the Limitation Act.

9. The next contentions are regarding, time being the essence of the contract and absence of readiness and willingness. It is

well settled position of law, that in respect of an agreement for sale of immovable property, time can never be the essence of contract. In the instant case, it is an admitted position, that on the date of the agreement of sale, the property in question was mortgaged with Buldhana Urban Credit Co-Operative Society, though the agreement does not reflect this position. However, city survey record in respect of the said property, annexed to the agreement contains an endorsement to this effect that the property is mortgaged with the Buldhana Urban Credit Co-Operative Society for the sum of Rs.13,00,000/-. There is further a document annexed to the agreement which is a certificate dated 22.06.2006 (Exhibit-43) which indicates, that the loan of Rs.1,50,000/- given to defendant, proprietor of Sapna Footwear was repaid on 22.03.2006. It is however material to note, that this certificate does not indicate, what was offered as a security for this loan, so as enable one to arrive at a conclusion, whether the mortgage of the suit property, as recorded in the city survey record stood redeemed, nor does it mention house number, city survey number, nor the location, dimensions or boundaries of the property. That apart, the city survey entry regarding the mortgage, indicated that the property was mortgaged for the amount of Rs.13,00,000/-, as against the which the certificate dated 22.03.2006 at Exhibit-43, indicated that an amount of Rs.1,50,000/- only was paid. Therefore, the contention of learned counsel Mr. Deshpande, that the loan stood repaid even prior to the execution of the agreement, could not have been accepted, as the document at Exhibit-43, the certificate dated 22.04.2006, did not indicate so. That apart, it has also been brought on record, that the Buldhana Urban Credit Co-operative Society, on 21.03.2007, issued a communication to the defendant at Exhibit-50, stating, that mortgage/charge on the suit property, cannot removed, as the defendant was a guarantor for the loan availed by his son, in which a sum of Rs.1,49,549/- was balance, and the mortgage would be removed only after payment of the said amount and not before. The cross-examination of PW-2 Shrikant Joshi, the Branch Manager of Jalna Branch of Buldhana Urban Credict Co-operative Society, also indicates, that the mortgage was removed only on 12.04.2007 and not earlier.

10. The contention, by learned counsel Mr. Deshpande, that the property already stood released from the mortgage on 23.03.2006, thus could not have been accepted by the courts below. It is trite, that it is obligatory upon a seller, to answer to the best of his information all relevant questions put to him by the buyer in respect of the property or title thereto as enumerated in Section 55(1)(c) and to discharge all encumbrances on the property then existing as required by Section 55(1)(g) of the Transfer of Property Act, so that a clear and transferable title is passed on to the purchaser. Mere mention of a time period in the agreement, by itself would not make, time the essence of

contract and the terms and conduct of the parties also has to be looked into and so also the capabality of the owner to pass a marketable title, within the time frame mentioned in the agreement. Considering the entry, in the city survey record, regarding a mortgage to the tune Rs. 13,00,000/- and nature of the certificate dated 2.03.2006 at Exhibit-43, coupled with the communication dated 21.03.2007 at Exhibit-50 and the evidence of PW-2, in my humble opinion, both the courts below erred in the holding, that time was of the essence of contract.

11. Insofar as readiness and willingness is concerned, a prospective purchaser, would be reasonably justified, in insisting in having a clear and marketable title to the property agreed to be purchased. The notice dated 04.10.2006, at Exhibit-30, clearly indicated, the willingness of the plaintiff to pay the balance consideration and get executed and registered the sale deed within 15 days of the receipt thereof. The reply by the defendant at Exhibit-42, also indicated that the defendant was ready to do so, however, the question of clearance from the Buldhana Urban Credict Co-operative Society, was the issue which appears to have hung in the air between the parties, which led to the litigation. The provisions of Section 16(c) of the Specific Relief Act require an averment to be made in the plaint regarding readiness and willingness, which finds place in Para-17 of the plaint as well as in Para-17 of the affidavit in lieu of evidence and thus the requirement of Section 16(c) of the Specific Relief

Act, duly stands satisfied. It is logically inconceivable, that the plaintiff, having already paid a substantial part of the consideration, having taken possession of the major portion of the suit property and also having registered the agreement, by paying stamp duty leviable thereupon would not go ahead and complete the transaction. What is also material to note, that though the defendant, has opposed specific performance, no counter claim or a separate suit has been filed for recovery of possession of the portion of the property, which has been placed in possession of the plaintiff, under agreement dated 04.04.2006, neither such a claim, is forthcoming till date. This clearly indicates, that the opposition to the grant of specific performance, on part of the defendant, was perfunctory, for had it not been otherwise, the defendant would surely have sued for recovery of possession of the portion of the property in which the plaintiff was so placed on the date of the agreement itself. All these factors, clearly have not been considered by the courts below. The trial court, merely presumed that the approach to the consumer forum, by the plaintiff, indicated his malafides and the period of eight months enumerated in the agreement dated 04.04.2006, was sacrosanct, without considering the entitlement of the plaintiff to have a clear and marketable title to the property, which was not forthcoming from the side of the defendant, due to the entry of the mortgage with the Buldhana Urban Credit Co-operative Society, in respect of the suit property, which line of reasoning has been toed by the first appellate court. The reliance upon **K.S. Vidyanadam** (Supra) by Mr. Deshpande learned counsel for the defendant is clearly misplaced for the reason, that **K.S. Vidyanadam** (Supra) itself holds, that the mentioning of certain time limits in the agreement to sale for taking steps by one or the other party, does not make time the essence of contract and was a case, in which, the suit for specific performance, was filed after a period of more than 2 ½ years subsequent to issuance of the notice and on the facts therein, it was held that due to delay in the institution of the suit, the plaintiff therein was not entitled for the specific performance. The facts in the present case are totally different inasmuch as before the time mentioned in the agreement was to expire, the plaintiff had already approached the District Consumer Forum for grant of relief of execution and registration of the sale deed in respect of the suit property.

12. **Saradamani Kandappan** (Supra) relied upon by Mr. Deshpande, learned counsel for the defendant, also holds, that in an agreement to sale immovable property, normally time is not of the essence, unless such an intention can be gathered either from express terms or impliedly from the intention of parties as expressed by the terms. The terms in an agreement, though may not expressly state so, but would include statutory obligation as contained in Section 55(1)(g) of the Transfer Property Act to transfer a clear and marketable title to the

purchaser and the ability of the seller to do so within the time so agreed. In case this is not so, then time can never be the essence of contract, which is the case in the present matter.

13. So also **Kamal Kumar** (Supra) relied upon by Mr. Deshpande, learned counsel for the defendant, does not assist him for the reason, that existence of concurrent finding of fact, is no bar to interference in Second Appeal, if the judgments of the courts below, are found to be perverse, illegal or contrary to the settled position of law. As held above, on all three substantial questions of law, both the courts below have ignored the settled position of law in applying the same to the facts on record and therefore, this is a fit case which needs interference.

14. The Second Appeal, is therefore, allowed. The judgments of the Civil Judge Senior Division, Jalna dated 13.03.2014 in Special Civil Suit No.68 of 2011 and the Adhoc District Judge-3 in RCA No.80 of 2014 dated 09.03.2017, are hereby quashed and set aside. There shall be a decree in the following terms in favour of the plaintiff:

a) The suit of the plaintiff is decreed. The defendant is directed to execute and register the deed of sale of the suit property in favour of the plaintiff, upon receipt of the balance consideration of Rs.2,00,000/- with interest thereupon at the rate of 8% per annum. The balance consideration with the interest as indicated above, shall be deposited by the plaintiff, before the trial court on or before 31.07.2021.

b) The defendant upon execution and registration of the sale deed in favour of the plaintiff, shall be free to withdraw the amount of balance consideration with interest as indicated above.

c) Upon execution and registration of the deed of sale, the defendant shall place the plaintiff, in actual physical possession of the remaining suit property on the day, the sale deed is executed and registered.

d) On failure of the defendant to execute and register the sale deed and deliver possession, the plaintiff shall be free to execute the decree, and obtain possession of the remaining suit property by levying execution.

e) On failure of the plaintiff, to deposit the balance consideration with interest as indicated above in the trial court on or before 31.07.2021, the suit for specific performance, shall stand dismissed with cost of Rs.25,000/-.

(**AVINASH G. GHAROTE, J.**)

Sameer