

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.781 OF 2018
WITH CA/11771/2018 IN SA/781/2018

SAYED NASIR SAYAD MAHEBOOB
VERSUS
DEELIP S/O PRALHAD SUPE AND ANR

...
Mr. P. R. Katneshwarkar h/f Mr. S. R. Andhale, Advocate for appellant.
Mr. C. K. Shinde, Advocate for respondent No.1
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17.11.2021

ORDER :-

. Present appeal has been filed by original defendant to challenge the concurrent judgment and decree passed by the Courts below.

2. The present respondents – original plaintiffs filed Special Civil Suit No.120 of 2013 for specific performance of the contract, perpetual injunction and in the alternative recovery of earnest amount. Learned 2nd Joint Civil Judge Senior Division, Aurangabad decreed the suit on 02.01.2017. The present appellant challenged the said judgment and decree by filing Regular Civil Appeal No.115 of 2017 before learned Adhoc District Judge-2 and Additional Sessions Judge, Aurangabad. The said appeal came to be dismissed on 20.08.2018. Hence, this second appeal.

3. Heard learned Advocate Mr. P. R. Katneshwarkar holding for learned Advocate Mr. S. R. Andhale for the appellant and learned Advocate Mr. C. K. Shinde for respondent No.1.

4. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence and the law points involved properly. Though the defendant is admitting that he had executed agreement to sell, it was in respect of 1 Acre 30 Gunthas land, however, a note was there that land would be measured and accordingly, it would be sold. Under such circumstance, both the parties were under the impression that the measurement is required to be done before the sale-deed takes place. The consideration was fixed to Rs.28,50,000/- per Acre. The defendant is admitting that he had received amount of Rs.10,00,000/- as earnest amount on the date of agreement and thereafter, Rs.8,00,000/-, however, he disputed receipt of amount of Rs.6,50,000/-. The measurement was carried out and the land turned out to be only 54 R. The remaining amount was not paid as per the schedule. Further, it has come on record that one of the plaintiff i.e. plaintiff No.2 was not having sufficient amount with him. Under such circumstance, it cannot be said that the plaintiffs were ready and willing to perform their part of the contract. Plaintiffs never issued notice prior to 07.12.2011 and a false endorsement was obtained that the defendant

has refused to accept the said notice. When, in fact, time was essence of the contract, both the Courts ought to have held that the suit was beyond the period of limitation. Further, the discretion ought to have been used and at the most, alternative relief ought to have been granted.

5. The learned Advocate for the appellant relied on the decision in ***A.C. Arulappan Vs. Ahalya Naik, [2001 DGLS(SC) 1004]***, on the point that “discretionary power to grant specific relief can be refused to maintain the equity between the plaintiff and the defendant. When the plaintiff was not fair and took unfair advantage of defendant or when plaintiff tried to take possession of the premises, even before the execution of the sale-deed or he uses coercion or threat, to execute the agreement, such relief can be refused.” Further, reliance has been placed on the decision in ***Gopal Chand Agarwalla Vs. Gopal Chandra Pal, [2002 DGLS (SC) 66]***, on the point that “when balance money was not paid within the time fixed for the payment and the time was essence of contract, then failure on the part of the parties seeking specific performance is duty bound to prove the readiness and willingness to perform their part of the contract.” Further, reliance has been placed on the decision in ***Sita Ram & Ors. Vs. Radhey Shyam, [2007 DGLS (SC) 1113]***, wherein it has been held that “an averment of readiness and willingness in the plaint is not a mathematical formula which should be

only in specific words, but any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief.” Further, reliance has been placed on the decision in ***Manohar @ Prabhakar Purushottamrao Wakil (Dead) through LRs and others Vs. Goma Nagoji Kamble (Dead) through LRs and others*, [2015 (4) Mh.L.J. 643]**, wherein it has been held that, “when the time was essence of the contract and there was no evidence from plaintiff’s side to indicate his willingness in terms of Section 16(C) of the Specific Relief Act, then a reasonable period of three years can be presumed after which it can be said that defendant was not interested in performing his part of the contract resulting in there being refusal to perform part of his contract.” In this case, even after giving plaintiffs a reasonable period of three years, suit was filed after about almost six years, then it was held that the suit was barred by limitation under Article 54 of the Limitation Act. Further, reliance has been placed on the decision in ***P. Meenakshisundaram Vs. P. Vijaykumar and another*, [2018 DGLS (SC) 207]**, wherein it has been held that, “when the record is completely silent about any communication sent towards completion of transaction rather first step was taken after six months after deadline by plaintiff, then it does not amount to readiness and willingness on the part of the plaintiff to

perform his part of the contract.” Further, reliance has been placed on the decision in *Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.*, [MANU/SC/0285/1993], wherein it has been held that, “under the terms of the contract, it has to be ascertained that whether parties intended to complete transaction in a reasonable time.” Further, reliance has been placed on the decision in *His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar*, [AIR 1996 SC 2095], wherein it has been held that, “ ‘readiness and willingness to perform’ has to be inferred from conduct of the parties and attending circumstances. Vendor would be in dire need of cash amount for the reasons and in such circumstance, the time would be the essence of contract.” If the purchaser is not having sufficient funds to pay consideration, then the relief of specific performance is rightly refused.

6. Learned Advocate appearing for the appellant, therefore, submitted that substantial questions of law are arising in this case requiring admission of the second appeal.

7. Per contra, the learned Advocate appearing for respondent No.1 supported the reasons given by the Courts below and submitted that entire amount of consideration is proved to have been given to the defendant, yet, in view of the fact that the prices of the property had

increased, the defendant took a stand for not to execute the sale-deed. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case.

8. At the outset, it is to be noted that the defendant has admitted that he had entered into agreement to sell. Further, it is to be noted that both the Courts below have consistently held on the basis of the documents those have been proved i.e. agreement to sell Exhibit-20 and Bharna Pavati Exhibit-21 and 22, that the entire amount has been paid. In fact, the defendant himself is admitting that he has received amount of Rs.18,00,000/- from plaintiffs. The defendant had disputed Bharna Pavati Exhibit-22, which showed that he received amount of Rs.6,50,000/-, however, in his cross-examination, he has then admitted that he has received that amount. So, the fact that he received the entire amount on or before 01.07.2010 has been proved.

9. The point for dispute thereafter would remain regarding readiness and willingness to perform the part of the contract. At the outset, it is to be noted from the contents of Exhibit-22 that it was agreed that the defendant has agreed to sell 1 Acre 30 R land, which was as per the 7/12 extract, yet the parties agreed that the land would be measured and after the boundaries are fixed, the sale-deed would be executed.

The agreement was entered into on 29.05.2010. The application for measurement was filed on 11.06.2010 and measurement was done on 19.06.2010, in which it was turned out that the suit property is admeasuring 54 R only. Though in the agreement Exhibit-20, it has been stated that the sale-deed would be executed within a period of four months, yet, the fact remain that other condition was to get the land measured. It was also done within the said period and even the entire amount as per Exhibit-20, 21 and 22 was paid on 01.07.2010. Thus, everything was done by the plaintiffs within a period of four months that was contended in agreement Exhibit-20. Therefore, definitely, the plaintiffs were ready and willing to perform their part of the contract when they had paid entire amount of consideration. The decisions on this point relied by learned Advocate for the appellant will not be applicable to the facts of this case. When all the above acts have been done within a period of four months, those were agreed by the parties, the point as to whether the time was essence of the contract or not will not come in view of the fact that if we consider the date of agreement to sell i.e. 01.07.2010 and the entire amount i.e. Bharna Pavati Exhibit-22, then within a period of two months itself all the things had taken place.

10. The defendant, in clear terms, has admitted in his cross-examination that if the plaintiffs are willing to give the amount as per

market rate, then he would be willing to sell the suit land to them. That means, now, he is expecting in view of the increase in prices that the plaintiffs should pay more amount, which cannot be the criteria which would go in favour of the defendant. It is also to be noted that after Exhibit-22 Bharna Pavati dated 01.07.2010, immediately on the next date i.e. on 02.07.2010, the defendant has purchased house property from one Rahul Ramchandra Kale. Thereafter, he has also purchased 81 R land on 20.12.2010 from one Shobha Abde. Thus, it can be seen that he has utilized the amount that was received towards consideration of the suit property and still, he is not willing to perform his part of the contract and, therefore, both the Courts have exercised the discretion in favour of plaintiffs and it is judiciously exercised.

11. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case requiring admission of the second appeal. Second appeal deserves to be dismissed at the threshold. Accordingly, it is dismissed.

12. In view of dismissal of second appeal, Civil Application No.11771 of 2018 stands disposed of.

[SMT. VIBHA KANKANWADI, J.]