

SPChauhan

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 56 OF 2023
WITH
CIVIL APPLICATION NO. 1131 OF 2022

Rajdhar Dangal Patil ... Appellant

Versus

Bhaidas Vasantrao Patil ... Respondent

....

Mr. D.S. Bagul – Advocate for Appellant

Mr. V.P. Raje – Advocate for Respondent

....

CORAM : GAURI GODSE, J.

DATE : 15th February, 2023

PER COURT :

1. This Second Appeal is preferred by the original defendant for challenging the decree for specific performance granted by the first appellate Court.
2. The respondent had filed Regular Civil Suit No. 19 of 2012 for specific performance of an agreement dated 30th July, 2001. By judgment and decree dated 24th February, 2015, the learned Civil Judge Junior Division, Shirpur, had partly decreed the suit. The learned Trial Judge had refused to grant specific performance, however, directed refund of the earnest amount to be repaid along with interest. The respondent plaintiff had

preferred Civil Appeal No. 43 of 2015. The said Appeal is allowed by judgment and decree dated 20th July, 2018, passed by the learned District Judge-5, Dhule. Learned District Judge has decreed the suit for specific performance by directing the defendant - present appellant to execute sale deed with respect to the suit property by accepting the balance consideration amount.

3. Learned Advocate appearing for the appellant submitted that the Trial Court after considering the evidence on record has rightly refused specific performance on the ground that the respondent had failed to prove his readiness and willingness to perform his part of contract. He, further, submitted that the suit was not within the period of limitation. In support of his contention, learned counsel submitted that it was the case of the respondent that the period for clearing the encumbrances was extended till 30th May, 2005 and, thereafter, there was a notice issued calling upon the appellant for executing the sale deed. However, the initial notice was withdrawn. He, further, submitted that on the basis of subsequent notice dated 13th July, 2008, again a demand was made for execution of sale deed and thereafter, the suit was filed. Learned counsel, therefore, submitted that though the time was not the essence of the

contract on the basis of the facts pleaded by the respondent, the suit was time barred. Hence, the suit ought to have been dismissed as barred by limitation.

4. Learned counsel for the appellant further submitted that the issue of limitation ought to have been decided on the ground that the suit was not filed within a reasonable time, as has been held by the Hon'ble Supreme Court in the decision of *Shenbagam and others Versus KK Rathinavel*.¹
5. Learned counsel placed reliance on the decision of the Hon'ble Supreme Court in support of his submission that even if time was not the essence of the contract the suit is required to be filed within a reasonable time. Hence, the suit ought to have been dismissed on the ground that the suit being barred by law of limitation as well as on the ground that the respondent was not ready and willing to perform his part of the contract, as the suit was not filed within a reasonable time.
6. Learned counsel appearing for the respondent supported the decree passed by the first appellate Court on the ground that the first appellate Court has very specifically dealt with the evidence and documents on record and recorded the findings in

1 2022 SCC Online SC 71

paragraph no. 14 of the impugned judgment that the suit was very well within a period of limitation.

7. Learned counsel for the respondent submitted that the learned District Judge was right in holding that since time was not essence of the contract, the period of limitation was to start only after clearing the encumbrances of the suit property. Since steps were never taken for clearing the encumbrances, there was no question of the suit being barred by the law of limitation. The respondent – plaintiff after waiting for a reasonable time had initiated action and filed the suit for specific performance.
8. Learned counsel for the respondent further also supported the impugned judgment on the point of readiness and willingness. He submitted that the appellant never adduced any evidence nor there was any cross-examination to controvert the oral evidence of the respondent – plaintiff. Thus, the learned District Judge by examining the evidence on record has recorded a positive finding that respondent has proved his readiness and willingness to perform his part of contract and that the respondent was entitled for the discretionary relief of grant of specific performance.
9. I have considered the submissions made on behalf of both the parties. I have perused the record of the Second Appeal. It is not

in dispute that the appellant failed to lead any evidence. The appellant had filed written statement, but failed to lead any oral evidence and had even failed to cross-examine the respondent. Hence, the oral evidence that was led by the respondent in support of his case with respect to readiness and willingness has remained uncontroverted. Though, in the written statement the execution of the agreement is disputed, both the courts have recorded a positive finding and accepted the execution of the agreement for sale.

10. The learned Trial Judge had partly decreed the suit by granting refund of the earnest amount. The learned Judge has also recorded the finding that the suit was within limitation. The findings recorded by the Trial Court on the point of limitation as well as execution of the agreement for sale was never challenged by the present appellant. The First Appeal was preferred by the respondent as the suit for specific performance was not decreed on the ground of readiness and willingness. Since the oral evidence of the plaintiff has remained uncontroverted, the first appellate court has rightly recorded a finding by accepting the case of the respondent that he was ready and willing to perform his part of contract.

11. With respect to the point of limitation and the reliance placed by the learned Advocate on the decision of the Hon'ble Supreme Court in the case of *Shenbagam* is concerned, there cannot be any debate with respect to proposition that has been laid down by the Hon'ble Supreme Court with respect to the reasonable time that has to be considered for grant of discretionary relief for specific performance. However, those observations and the propositions laid down by the Hon'ble Supreme Court are not applicable to the facts of the present case. In the case before the Hon'ble Supreme Court, it was specifically brought on record the long efflux of time of over 40 years that had occurred and the rise in value of the property in the meantime. Hence, with respect to the facts of the case the Hon'ble Supreme Court has held that though the time was not the essence of the agreement, in deciding the grant of specific performance in the suit relating to sale of immovable property, the court has to take into cognizance the conduct of the parties, escalation of price and whether the efforts of the parties would be unfairly benefited from the decree. So far as the facts of the present case are concerned nothing is brought on record by the appellant with respect to these factors which are to be considered with respect to escalation of price and conduct of the

parties. In the facts of present case the conduct of the parties is to be seen. The appellant had chosen not to produce any evidence and has chosen not to controvert the evidence which was led by the respondent. There is nothing argued on point as to whether any efforts were made on behalf of the appellant for setting aside the orders that were passed for no cross-examination and no evidence on the part of the appellant. Hence, the submissions on behalf of the appellant cannot be taken into consideration for deciding the present Second Appeal.

12. Thus, in such circumstances, the submissions which are made on behalf of the appellant would require this Court to re-assess the evidence on record which is not permissible in the Second Appeal. I do not find that the Second Appeal involves any question of law. Second Appeal is dismissed. There will be no order as to costs.
13. In view of the dismissal of the Second Appeal, pending Civil Applications do not survive and the same are dismissed.

[GAURI GODSE]
JUDGE