

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

SECOND APPEAL NO. 819 OF 2022

Rajesh Shantilal Bagul
Age : 35 years, Occu. : Business,
R/o. : Abhinav School, Bhadgaon Road
Takali, Tal. Chalisgaon,
Dist. Jalgaon.

.. Appellant
(Orgi. Defendant)

Versus

Sulochana Bhagwan Ahire
Age : 55 years, Occu. : Service
R/o. : Takali (Pra.Cha.)
Tal. Chalisgaon, Dist. Jalgaon
Present R/o. : Plot No. 7, Ring Road
Behind Bank of Baroda, Hareshwar Nagar
Jalgaon, Tal & Dist. Jalgaon.

.. Respondent
(Orgi. Plaintiff)

Mr. A. R. Syed, Advocate for the Appellant.
Mr. S. V. Suryawanshi, Advocate for Respondent.

CORAM : KISHORE C. SANT, J.

DATED : 04th DECEMBER, 2023.

P C. :-

. Heard the parties for long.

2. This second appeal is by the original defendant who had also filed a counter claim in the learned Trial Court. The facts in short are that the parties entered into agreement dated 15.12.2007 wherein, the plaintiff was to sale the suit land from Gat No. 498 from village Takali,

Taluka Chalisgaon, District Jalgaon. The consideration was Rs. 2,65,000/-. The recital of the agreement shows that the amount was to be paid within six (06) months from the date of agreement. Rs. 65,000/- was received on the date of agreement itself towards earnest amount. About the possession, the recital shows that it was to be handed over at the time of execution of sale deed on receiving amount of Rs. 2,00,000/- on or before 15.06.2008. The plaintiff issued notice to the defendant on 21.11.2009 for rescission of contract as the amount was not paid. The said notice was replied by brother of the defendant saying that he has received the possession and he is ready to pay the amount. The plaintiff again issued second notice on 23.12.2010. However, no steps were taken by the defendant to hand over the possession to the plaintiff.

3. The plaintiff filed a suit for rescission of contract and for possession. The defendant appeared in the suit filing written statement. He also filed a counter claim seeking specific performance of contract. The learned Trial Court after taking the evidence specifically recorded a finding that, the time was at essence of contract. Since the amount was not paid within six (06) months from the date of agreement of sale the same was terminated and passed the decree of possession forfeiting an amount of Rs. 65,000/- as per the terms of the

agreement.

4. The defendant filed appeal challenging the judgment and order dated 26.04.2007. However, the learned District Judge by way of judgment and order dated 25.05.2022 dismissed the R.C.A. No. 919/2017.

5. It is argued on behalf of the defendant that, in this case though by going through agreement it appears that the time was at essence of contract, however, in view of subsequent conduct it is seen that the time was extended to complete the contract. The agreement was executed on 15.12.2007 wherein, the recital shows that the possession was to be handed over on the date of execution of sale deed. However, on 13.06.2008 the defendant paid an amount of Rs. 2,00,000/- i.e. the amount of remaining consideration. The plaintiff received that amount and put the defendant in possession with the understanding that only sale deed was to be executed at a convenient time. He thus submits that the time was thus extended for execution of sale deed. His further submission is that the learned Trial Court has wrongly relied upon the evidence of the plaintiff which was against the recitals in the agreement and in view of Section 92 of the Indian Evidence Act. Such evidence could not have been considered by the learned Trial Court. He thus submits that both the Courts below have committed error. A fact of

possession with the defendant is admitted. Considering this admitted position if the possession was to be handed over at the time of sale deed it necessarily means that it was not handed over on the date of agreement. Necessarily it was handed over some time after, which according to him, on 13.06.2008. He further submits that theory of the plaintiff about delivery of possession on the date of agreement itself ought to have been discarded.

6. Learned advocate for respondent submits that both the Courts below are concurrent on the question of finding of facts. Both the Courts below have clearly held that time was at essence of contract. Such question is necessarily a question of fact and this Court in second appeal need not go into the question of facts. No case is made out that the findings recorded are perverse or against the evidence or recorded in absence of any evidence. He submits that in view of Section 91 of the Indian Evidence Act, oral evidence can be laid to show that the terms of the agreement are otherwise than the document or were not acted upon. He submits that the defendant could not prove the fact of payment of Rs. 2,00,000/-. No receipt is on record. The defendant could not prove that the possession was handed over on 13.06.2008. He submits that even otherwise it is difficult to appreciate that the defendant would pay an amount of Rs. 2,00,000/- without obtaining

even a receipt. About handing over possession on 13.06.2008 also there is no evidence. He submits that specific six months time was decided for execution of the sale deed on payment of the amount. The consequence is also provided that is of forfeiture of the amount. Both the Courts below rightly come to the conclusion that the time was at essence of contract.

7. Learned advocate for the appellant in support of his submissions relied upon the judgment in the case of **Babulal Harchand Beldar and ors. Vs. Sitaram Kathu Borse and ors.** reported in **2016 (5) ABR 680**. In that case, Article 54 of the Limitation Act was considered which provide the term as 'date fixed' used in Article means a date having final or crystallized or character not subject to change or fluctuation.

8. He further relied upon the judgment in the case of **Swarnam Ramchandran and ors. Vs. Aravacode Chakungal Jayapalan** reported in **MANU/SC/0679/2004** in support of his submissions that whether time is at essence of contract needs to be considered from (i) the express words used in the contract, (ii) the nature of the property which forms the subject matter of the contract, (iii) the nature of the contract and (iv) surrounding circumstances submitting that the Court has not considered the surrounding circumstances.

9. On going through the judgment of the learned Trial Court it is seen that, the learned Trial Court considered the evidence of the plaintiff that the suit property was handed over on the date of agreement itself. The recital about handing over of the possession at the time of execution was by typographical mistake. The learned Trial Court also held that the defendant obtained possession of the suit property on the date of agreement. Admittedly, the possession is given to the defendant. The learned Trial Court held that the recital about handing over the possession at the time of sale deed appears to be typographical mistake. The contents of the agreement shows the intention of the properties to complete the contract within six months. It is held that, there is no proof of handing over the amount in cash on 13.06.2008 by the defendant. The defendant had thereafter deposited an amount of Rs. 2,00,000/- in the Court while filing application Exh. 56. On recording the evidence and after appreciating the documentary evidence the learned Trial Court passed the decree.

10. This Court does not find any perversity in the reasoning of the learned Trial Court which is accepted by the learned Appellate Court. In the agreement there is nothing to show that the possession was to be handed over in between the date of agreement and the date of sale deed. When the possession is admittedly with the defendant, it needs

to be accepted that it was handed over on the date of agreement itself. It is usually a practice either to hand over the possession on the date of agreement or on the date of execution of sale deed. There is no question of handing over the possession somewhere in between. It hardly can be believed that a person would hand over possession of the property and the amount in cash of Rs. 2,00,000/- without obtaining even a receipt from other party. Considering the oral evidence of the parties as it is the defendant could not prove any other evidence except oral evidence that he paid the amount on 13.06.2008. When there is such kind of evidence the Courts below were right in not believing the evidence of the defendant.

11. Considering the judgment in the case of **Babulal Harchand Beldar and ors.** (supra), this Court finds that, there is no dispute about proposition, about limitation and about the applicability of Article 54 of the Limitation Act. However, in the present case this Court finds that the said judgment is not applicable. So far as the judgment in the case of **Swarnam Ramachandran and ors.**(supra), also there is no dispute about the proposition. In the said judgment in paragraph No. 10 the Court has held that, whether time is essence of the contract is a question of fact and the real test is intention of the parties. It depends upon facts and circumstances of the case. It is clear that, a question as

to whether the time is of essence of contract is necessarily a question of fact. This Court finds that, except above ground no other ground is raised in the appeal. This Court finds that, in view of facts and the judgments, in the present case no substantial question of law arises. Hence, the following order :

12. The second appeal stands dismissed.

(KISHORE C. SANT, J.)

PS.B.