

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 16 OF 2015
WITH
MISC. CIVIL APPLICATION NO.2551 OF 2021 (F)
WITH
STAMP NUMBER (APPLN.) NO.3397 OF 2019
WITH
STAMP NUMBER (APPLN.) NO.3398 OF 2019
WITH
STAMP NUMBER (APPLN.) NO.2438 OF 2019
WITH
STAMP NUMBER (APPLN.) NO.1021 OF 2020
IN
MISC. CIVIL APPLICATION NO. 445 OF 2018
WITH
STAMP NUMBER (APPLN.) NO.1020 OF 2020
IN
MISC. CIVIL APPLICATION NO. 445 OF 2018

1. Mathurabai w/o Saju Naik @ Bandadkar,
major of age, occupation housewife, r/o. part of
House No.34, Plot No.2, Madabhat Kalimati,
Bhoma (since deceased) through her LR's.

1. (i) Jyoti Naguesh Naik @ Bandodkar,
1. (ii) Pinky Jayesh ShetNervekar @ Santoshi
Dashrath Sawant,
1. (iii) Jayesh Datta ShetNarvekar,
1. (iv) Dilip Gopal Naik,
1. (v) Sandeep Gopal Naik,
1. (vi) Sonam Sandeep Naik,
1. (vii) Nilesh @ Ritesh Gopal Naik
1. (viii) Poonam Gopal Naik,

All major and all resident of part of House
No.34, Plot No. 2; Madabhat Kalimati, Bhoma,
Taluka Ponda, Goa.

2. Naguesh s/o Saju Naik @ Bandadkar, major of age, occupation: business, r/o part of House No.34, Plot No. 2, Madabhat Kalimati, Bhoma, Taluka Ponda, Goa.

3. Gulabo Dashrat Sawant, major of age, occupation: housewife; r/o Plot No. 1, Madabhat Kalimati, Bhoma, Taluka Ponda, Goa.

... Appellants.

Versus

1. Amresh s/o Balachandra Anvekar, major of age, occupation: business, resident of part of House No.34 Plot No. 2, Madabhat Kalimati, Bhoma, Taluka Ponda, Goa.

2. Shri. Dashrath Mahadev Sawant, major of age, occupation: business ; r/o Plot No. 1, Madabhar Kalimati, Bhoma, Taluka Ponda, Goa (Since Deceased - suit dismissed as against Respondent No. 2/Defendant No. 3 as per Order dated 05-09-2009 of Hon'ble Civil Judge, Senior Division at Ponda, Goa)

...Respondents.

Mr Ryan Menzes and Ms Jina Almeida, Advocates for the Appellants.

Shri Amresh Balachandra Anvekar, Respondent No.1 in person.

CORAM : M. S. SONAK, J.

Reserved on : 13th APRIL 2023

Pronounced on : 20th APRIL 2023

JUDGMENT :

1. This Appeal is directed against the concurrent Judgments and Decrees dated 15/5/2013 and 17/12/2014 passed by the Trial Court and the First Appellate Court, decreeing Special Civil Suit No. 31/2004/A for specific performance of an Agreement for sale dated 10/12/2003, instituted by Respondent No.1 (Plaintiff).

2. This Second Appeal was admitted by an order dated 25th March 2015 on the following substantial questions of law :

(i) Whether the courts below failed to appreciate that Clause (1) of the Agreement dated 10th December, 2003 of which the Plaintiff sought specific performance, itself provided in clear terms that the entire consideration/sale price agreed to therein, was required to be paid within a period of 3 months thereof, or a further period of 1 month, along with 12 % interest thereon, the said agreement would stand terminated, as would Respondent No.1's entitlements thereunder, with forfeiture of an amount of ₹ 30,000/- to the Appellant No.1, and return of the balance any amounts paid by the Respondent No.1 to the Appellant No.1 free from interest, and as such time was indeed the essence of the contract?

(ii) Whether the courts below erred in directing the Appellants to complete the mutation in respect of the record of rights of the property which is the subject matter of the said agreement, when no such relief was claimed by Respondent No.1, more so when the same would be the subject matter of a proceeding before a quasi-judicial authority, and the disposal thereof is not in the hands of the Appellants?

3. Later, an order dated 9th April 2021 formulated the following additional substantial question of law.

Whether, (assuming the Respondent was entitled to a decree directing the Appellants to execute a sale deed in his favour, as claimed by him), in view of the fact that in Clause (1) of the Agreement of Sale dated 10/12/2003, provided for interest of 12% p.a. to be paid on any delayed payment of the consideration thereunder, the Trial Court erred in directing interest to be paid at 6% p.a., i.e. half the agreed contractual rate, and the Appellate Court erred in upholding the same?

4. Mr Ryan Menezes, learned Counsel for the Appellants, referred to Clause (1) of the Agreement dated 10/12/2003 to submit that payment of the balance consideration of ₹2,80,000/- was of the essence of the contract. Since, admittedly, the entire balance amount of ₹2,80,000/- was not paid within three months or even an additional one month from the date of execution, the agreement stood terminated for all legal effects by forfeiting an amount of ₹30,000/-. He submitted that Plaintiff paid only an amount of ₹2,08,000/-, as against the required payment of ₹3,30,000/- within the period stipulated in the agreement.

5. Mr Menezes submits that given the precise terms of Clause (1) of the Agreement, the two Courts erred in decreeing the suit for specific performance despite breaches attributable to Plaintiff. Mr

Menezes relied on *A.K. Lakshmipathy (Dead) and Ors. v. Rai Saheb Pannalal H. Lahoti Charitale Trust and Ors.*¹

6. Mr Menezes submitted that there was no relief regarding mutation in the plaint. He offered that the mutation proceedings must be independently instituted before quasi-judicial Authorities under the Land Revenue Code. Therefore, he submits that the two Courts erred in directing mutation in the rights record. Based upon this, Mr Menezes urged that the second substantial question of law, as formulated, must be decided to favour the Appellants (original defendants).

7. Finally, Mr Menezes submitted that without prejudice to his contention that the suit should be dismissed, the two Courts erred in directing the Plaintiff to pay interest on the balance consideration amount at only 6% per annum. He submitted that in terms of the agreement between the parties, the interest was provided at 12% per annum. He presents that though this point may not have been urged before the two Courts, there was no serious dispute on this aspect, given the terms of the agreement for sale dated 10/12/2003. Mr Menezes, however, clarified that this submission was strictly without prejudice to the first two submissions related to the first two substantial questions of law formulated on 25th March 2015.

1. 2010 (1) SCC 287.

8. Mr Amresh Anvekar appeared in person. He defended the impugned Judgments and Decrees based on the reasoning reflected therein. He also filed written arguments and relied on *Smt. Janki (since deceased) through LRs. vs Sh. Gurdev and anr.*²; *Satnam Singh vs Satnam Singh*³; *P. Ramasubbamma vs. V. Vijayalakshmi and ors.*⁴

9. Mr Amresh Anvekar submitted that time was not of the essence, and in any case, the agreement had to be read in its entirety. He submitted that no mutation was carried out by the original Defendants even though they were to carry out such a mutation. He pointed out that a substantial amount of ₹2,08,000/- was paid by him in the fond hope that the mutation would be carried out before the execution of the sale deed. He submitted that he had offered to pay the balance amount or deposit the balance amount in the Court to show his readiness, willingness, and bona fides. He submitted that the two Courts had recorded concurrent findings on fact and since there was no ground of perversity even formulated, such findings of fact did not call for any interference by exercising the limited jurisdiction under Section 100 of the Code of Civil

2. AIR 2019 HP 54

3. AIR 2022 SC 2056

4. AIR 2022 SC 1793

Procedure. He relied on *Sir Chunilal V. Mehta & Sons Ltd. v. The Century Spinning and Manufacturing Co. Ltd.*⁵.

10. Based upon the above submissions, Mr Amresh Anvekar urged for the dismissal of this Second Appeal.

11. Rival contentions now fall for my determination.

12. The original Plaintiff (Respondent) and the original Defendants (Appellants) entered into an Agreement for sale dated 10/12/2003, under which the Defendants agreed to sell to the Plaintiff a plot admeasuring 380 sq. metres, together with an old house bearing No.34 existing therein for a total consideration of ₹3,30,000/-. There is no dispute that the Plaintiff, at the time of execution of this agreement, paid Defendant an amount of ₹ 50,000/-.

13. The balance consideration of ₹2,80,000/- was agreed to be paid within three months from the date of execution of the agreement, failing which interest at the rate of 12% per annum was to be charged for the first month and failing the payment within the said month, then, a sum of ₹30,000/- was to be forfeited in favour of the Defendants and the balance amount was to be refunded, without any interest to the Plaintiff. The agreement was to stand terminated with all legal effects, the Plaintiff had no right to the

5. 1962 Supp (3) SCR 549

plot in question, and the Defendant would be free to dispose of the same to any other party of his choice.

14. The above is reflected in Clause (1) of the agreement dated 10/12/2003, which is transcribed below for convenience of reference :

"1. That by this agreement the Vendors have agreed to sell to the purchaser the above mentioned plot no. 2 of an area of 380 sq. meters together with the old house existing therein bearing H.No. 34 to the Purchaser who has agreed to purchase the same for the total consideration or price of Rs. 3,30,000/- (Rupees three lakhs thirty thousand only) out of which the Purchaser has paid today a sum of Rs. 50,000/- (Rupees fifty thousand only) as and by way of earnest money and par of the price which amount the Vendor here by admit of having received from the Purchaser and give to the purchaser the necessary receipt and discharge of the same and the balance sum of Rs. 2,80 000/- (Rupees two lakh eighty thousand only) shall be paid within a period of 3 months from today failing which interests @ 12% p.a. shall be charged for the first month and failing to pay the said amount within the said month then a sum of Rs. 30000/- [Rupees thirty thousand only] shall stand forfeited in favour of the Vendor and the balance sum shall be refunded without any interest to the Purchaser and the present agreement shall stand terminated for all legal effects and the Purchaser shall have no right to the said land and the Vendor shall be free to dispose off the same to any other party of the choice of the Vendor."

15. The initial term of three months expired on 10/3/2004. The additional period of one month expired on 10/4/2004. There is no

dispute and even otherwise, there is overwhelming oral and documentary evidence to establish that Plaintiff paid an amount of ₹2,08,000/- to Defendant by 8/3/2004. There is also evidence about the Plaintiff being placed in possession of a portion of the house in the plot, which was the subject matter of the agreement for sale. This finding of fact has not even been challenged, assuming that such a finding could have been challenged in a second appeal since such findings were backed by evidence on record.

16. The Plaintiff, by reference to Clause (3) of the agreement, wrote to the Defendants to complete the mutation proceedings so that he could pay the balance consideration amount before execution of a sale deed. There is evidence about the Plaintiff approaching the Defendants and requesting them to complete the mutation proceedings so that he could pay the balance amount and complete the transaction. In addition, legal notices are produced on record in which Plaintiff has made similar demands on Defendants.

17. Clause (3) of the Agreement dated 10/12/2003 is relevant, and the same reads as follows :

"The Vendor hereby state that the mutation proceedings have not been done by the Vendor i.e. to insert the name of the Vendor in the occupants column which mutation shall be cleared by the Vendor within a period of 3 months and if extended by the Vendor then within the said extended period."

18. The two Courts have recorded that the Plaintiff had even offered to deposit the balance consideration amount in the Court to show his bona fides and support his plea of readiness and willingness to perform the part of the contract. Even this position, therefore, cannot be disputed.

19. The first substantial question of law regarding the time being of the essence of the contract will, therefore, have to be examined in the background about undisputed or proven facts. There is no perversity in the record of such finding of fact; therefore, quite correctly, no substantial question of law was urged to challenge these proven facts. This is a case of concurrent findings of fact; therefore, without any perversity being established, such findings are almost immune from challenge in a second appeal.

20. In *Chand Rani (Smt.) (Dead) by LRs. vs Kamal Rani (Smt) (Dead) by LRs.*⁶, the Hon'ble Supreme Court has explained that it is a well-settled principle that in the case of the sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity, which governs the parties' rights in the specific performance of a contract to sell real estate, the law looks not at the letter but at the substance

6. (1993) 1 SCC 519

of the agreement. Therefore, it has to be ascertained whether, under the contract terms, the parties named a specific time within which completion was to take place, really and in substance, it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.

21. Further, the Hon'ble Supreme Court, after referring to *Gomathinayagam Pillai vs Pallaniswami Nadar* - AIR 1967 SC 868, held that it is not merely because of the specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if the parties intend it that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, the conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, the nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to the sale of immovable property, it would normally be

presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make the time of the essence.

22. The Hon'ble Supreme Court, by referring to *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* - AIR 1915 PC 539, held that the principle underlying Section 55 of the Contract Act did not differ from those obtained under the law of England as regards contracts for the sale of land. The Privy Council observed that under that law, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, the Court looks not at the letter but at the substance of the agreement to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The Privy Council held that a Court of equity would indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion or for the steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulation between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. This is what is meant, and

all that is meant when it is said that in equity, time is not of the essence of the contract.

23. The Hon'ble Supreme Court added that the special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect, the language of the stipulation must show that the intention was to make the parties' rights depend on the observance of the time limits prescribed unmistakably. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain and that to disregard them would be to disregard nothing that lay as its foundation. Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law, the contract has not been literally performed by the Plaintiff as regards the time-limit specified.

24. In *Govind Prasad Chaturvedi vs. Hari Dutt Shashtri* - [1977 (2) SCC 539], the Hon'ble Supreme Court followed the ruling of the Privy Council in *Jamshed Khodaram Irani* (supra). It held that it is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to the

time the essence of the contract. When a contract relates to the sale of immovable property, it will normally be presumed that time is not the essence of the contract. It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that stipulation as to time is not the essence of the contract in a contract of sale of land.

25. Thus, from the above decisions, it is clear that even where the parties have expressly provided that time would be the essence of the contract, such a stipulation would have to be read along with other provisions of the agreement, and such other provisions may, on the construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental.

26. In the present case, time was not explicitly made the essence of the contract. Because some time limits were specified in Clause (1), that was insufficient to displace the normal presumption that time is not the essence of the contract when it comes to an agreement relating to immovable properties. Here again, a provision was made for interest. Therefore, Clauses (1) and (3) must be considered together. A combined reading of the two clauses suggests

that the Defendant was to carry out the mutation within three months or, if extended by the Defendant, within the extended time. Clause (3) did not provide for any ceiling regards the extension period. Thus, the entire contract between the parties suggested that the Defendant were to carry out the mutation so that at the time of the actual sale, the suit plot and the house therein were mutated in his name.

27. Even Clause (1), upon which the Defendant (Appellant) so much relies, provides that in case of default in payment of balance consideration amount of ₹2,80,000/- within four months, only a sum of ₹30,000/- would be forfeited. After that, the balance had to be refunded by the Defendant to the Plaintiff, and only after that, the agreement would stand terminated for all legal purposes. But, admittedly, the Defendants never bothered to refund the amount of ₹2,08,000/- which they had already received within the period stipulated in Clause (1) of the agreement. Even during the pendency of the suit or the Appeal, there was no offer for deposit or return of this amount though, the contention was that the agreement had stood terminated.

28. The two Courts have evaluated the oral and the documentary evidence on record. The two Courts have considered the parties' evidence in great detail and even analysed the parties' conduct. The Plaintiff has established how he was otherwise ready and willing to

perform his part of the contract. The evidence on record suggests that the Plaintiff made substantial payments within the date stipulated in Clause (1). The evidence also indicates repeated demands from the Plaintiff to the Defendants about the mutation and execution of the sale deed. Therefore, the aspect of readiness and willingness on the part of the Plaintiff is proved, as noted by the concurrent findings of the two Courts, which suffer from no perversity.

29. At one stage, Mr Menezes urged that the Plaintiff objected to the mutation proceedings when undertaken by the Defendants. The Plaintiff's objection was at the belated stage when he suspected that the Defendants would sell the suit plot and the house therein to some third parties, based upon their interpretation that the agreement dated 10/12/2003 had stood terminated. However, there is evidence about the Plaintiff pursuing the matter with the Defendants, so there could be a proper mutation and completion of the transaction. The Plaintiff had paid a substantial portion of the agreed consideration, and the two Courts have correctly held that the Plaintiff had nothing to gain by delaying the balance payment. There is evidence about the Plaintiff having the means to pay the balance component and the Plaintiff even offered to deposit the balance component in the Court to support the point of readiness and willingness and his bona fides.

30. *A.K. Lakshmipathy (Dead) and Ors.* (supra), relied upon by Mr Menezes turns on facts which have no parallel to the present case. Even in this case, the Hon'ble Supreme Court reiterated that there could be no presumption that time is the essence of the contract relating to the sale of immovable property. It is well settled by now that time is not to be of the essence in the cases of the sale of immovable property unless the agreement explicitly says so or other circumstances establish so. This decision also relied on *Chand Rani vs Kamal Rani* (supra). On facts, the Court found not just from the clauses in the agreement but also the surrounding circumstances and the parties' conduct that time was of the essence. The facts in the present case are quite different, therefore, this decision will not apply. The Hon'ble Supreme Court held that the Plaintiff failed to prove readiness and willingness in the case of *A.K. Lakshmipathy (Dead) and Ors.* (supra).

31. For all the above reasons, the first substantial question of law must be answered against the Appellants (original Defendants) and favouring the Respondent (original Plaintiff).

32. In so far as the second substantial question of law is concerned, as noted earlier, the Defendants had undertaken to carry out mutation. The Courts have directed the Defendants to carry out the mutation to make the Decree of specific performance more effective. Thus, in effect, the Court has granted a decree of specific

performance requiring the Defendants to perform their bargain of the contract. No specific relief, in this regard, was necessary, and the grant of such relief is not more than what was claimed.

33. From a perusal of the plaint, it is clear that the suit was for specific performance of the agreement for sale dated 10/12/2003. This agreement expressly contemplated the Defendants carrying out the mutation within three months as a prelude to the execution of the sale deed. Therefore, a decree of specific performance would include a direction to comply with this part of the contract by the Defendants.

34. Therefore, even the second substantial question of law must be decided against the Appellants (original Defendants).

35. Regarding the additional substantial question of law, Mr Menezes is on a better footing. Clause (1) of the agreement provided 12% interest per annum for the delay in payment of the balance consideration beyond three months. There is evidence that the Plaintiff was also put in possession of a portion of the house in the suit plot, which was also agreed to be sold to the Plaintiff vide agreement dated 10/12/2003. Out of equitable consideration, even the Trial Court directed the Plaintiff to pay the Defendants interest at 6% per annum on the delayed component. The Plaintiff never questioned this portion of the Decree.

36. The Plaintiff only urged that interest at 12% per annum may not be ordered because the Defendants did not mutate. He submitted that he was always ready and willing to pay the balance consideration amount, which was relatively small compared to what he had already paid to the Defendants. This argument would apply even for the award of interest at 6% per annum, which the Plaintiff never chose to challenge. Therefore, the liability to pay interest on the delay component stands established. The only question is about the rate at which such interest would have to be paid.

37. Since the agreement stipulates an interest rate of 12% per annum, there is no reason to deny the Defendants interest at 12% per annum on the balance consideration. Moreover, the Defendants had even placed the Plaintiff in possession of a portion of the house in the suit plot, which was also agreed to be sold to the Plaintiff. Therefore, in law and equity, it would be appropriate to direct the Plaintiff to pay the Defendants interest at 12% per annum instead of 6% per annum awarded by the Trial Court and confirmed by the First Appellate Court.

38. Accordingly, the additional substantial question of law will have to be answered favouring the Appellants (original Defendants).

39. As a result, this Appeal is disposed of by making the following Order:

- (A) The impugned Judgments and Decrees, to the extent they grant the Respondent (original Plaintiff) decree for specific performance, are upheld;
- (B) The direction in the impugned Judgments and Decrees to the original Plaintiff to pay interest at the rate of 6% per annum on the balance consideration amount is modified and substituted by the requirement to pay interest at the rate of 12% per annum;
- (C) The direction in the Trial Court's Decree to complete the mutation proceedings within three months is modified by requiring the Defendant No.1 to institute mutation proceedings within three months from the receipt of the balance amount, together with interest at the rate of 12% per annum.
- (D) Save and except the above modifications, the impugned Judgements and Decrees dated 15/5/2013 and 17/12/2014 made by the Trial Court and the First Appellate Court are not interfered with;
- (E) The Decree to be modified in the above terms.

40. There shall be no order for costs. All pending Misc. Civil Applications stand disposed of.

M. S. SONAK, J.

41. At the request of Mr Menezes, the execution is stayed for a period of four weeks from today.

M. S. SONAK, J.