

Dusane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.50 OF 2023
WITH
INTERIM APPLICATION NO.457 OF 2023**

Mr. Vinod Manohar Deshpande ...Appellants
(since deceased) through LRs.
Smt. Geetanjali Vinod Deshpande
& Ors.

V/s.

Mr. Satish Eknath Chauhan ...Respondent

Mr. Shailendra S. Kanetkar for Appellants/
Applicants

CORAM: MADHAV J. JAMDAR, J.
DATE: 17th JANUARY, 2023

P.C.:

1. Heard Mr. Kanetkar, learned Counsel appearing for the Appellants. He submitted that following three substantial questions of law are involved in the present Second Appeal:

- (i) Whether the findings of both the Courts that the Plaintiff has proved his readiness and willingness is in accordance with the evidence on record ?
- (ii) Whether the suit filed by the Respondent is within limitation?

(iii) Whether the Civil Court has jurisdiction to deal with the Suit?

2. Before considering the substantial questions of law as submitted by Mr. Kanetkar, it is relevant to note few factual aspects.

3. Admittedly, the Appellants are the landlords of the Respondent. As the suit building has become dilapidated, the Appellants executed Agreement of Sale dated 22nd October 2001 with the Respondent. The said agreement was executed by the Appellant in his capacity as owner-developer and the Respondent in his capacity as purchaser. By the said agreement, the Respondent agreed to purchase from the Appellant flat bearing No. C-1 on the 2nd Floor admeasuring about 650 sq.ft. for total consideration of Rs.4,35,910/-. The said flat is agreed to be purchased on the ownership basis. Out of the said consideration, an amount of Rs.65,386/- i.e. 15% of the consideration was paid by cash and cheque on the date of execution of the said agreement and balance amount of Rs.3,70,524/- was to be paid in instalments as set out in Clause-(2) of the agreement. The said instalments are set out hereinbelow for ready reference :

1.	15% at the time of executing this Agreement	Rs.65,386/-
2.	Completion of Plinth	Rs.94,447/-
3.	22% on 1st Slab	Rs.94,447/-
4.	22% on 2nd Slab	Rs.94,447/-
5.	20% at the time of completion of P.M.C.	Rs.87,183/-
	TOTAL Rs.:	4,35,910/-

4. Clause Nos. 3, 4 and 5 of the said agreement are also relevant. The said clauses read as under:

"3. The party of the first part hereby agrees to hand over the **possession** of the flat agreed to be sold/ allotted to the party of second part, **on or before 31st May 2003**. The party of **first part shall complete the construction** of the said flat as agreed to herein **within a period of 18 months** from the date of this agreement and **shall hand over the possession thereof to the party of second part after completing all flat amenities and civil work**. If the **owner developer fails to complete the construction and hand over vacant and peaceful possession within the stipulated time i.e. within 18 months** from executing this agreement **the owner developer shall pay Rs.5,000/- per month to the purchaser for delayed period**. The purchaser shall have right to adjust the said amount in the instalments payable by the party of the second part.

4. The purchaser admit that the **grant of completion certificate by the Pune Municipal Corporation** in respect of the **said flat shall** be conclusive proof as to the **completion of construction** thereof.

5. The party of first part shall **communicate to the party of second part on the completion of the said flat** and purchaser shall pay the remaining balance out of the outstanding cost to the owner subject to clause No. 4 above and shall shift into the newly completed flat, more particularly described in Schedule 'B'."

(Emphasis added)

5. The suit notice was issued on 9th April 2008 and the suit was filed on 21st August 2008 *inter alia* seeking specific performance of agreement of sale dated 22nd October, 2001.

6. The substantial questions of law raised by Mr. Kanetkar, learned Counsel appearing for the Appellants are required to be examined in the light of factual position and the evidence on record.

7. As far as the first substantial question of law that the Plaintiff has proved his readiness and willingness is concerned, it is the contention of Mr. Kanetkar that the Plaintiff has failed to pay as per the instalments agreed in the agreement. Both the Courts have concurrently found that the Defendant has not informed the Plaintiff after completion of each stage of construction and the Defendant has not issued any notice to the Plaintiff to pay any instalment and therefore, the Plaintiff cannot be faulted for non-payment of said instalments. In fact, both the Courts have concurrently held that the Defendant has denied the execution of agreement of sale itself and therefore noted the said conduct of the Defendants.

8. The learned Courts have also taken into consideration the aspect that the Plaintiff has deposited entire balance amount in the Court after filing of the suit. Both the Courts have concurrently found that the Plaintiff has proved his readiness

and willingness.

9. It is also important to note that as per Clauses 3 to 5 of the agreement, if on or before 31st May 2003, the Appellant fails to hand over possession of the flat in question with completion certificate of the Pune Municipal Corporation then the Developer was under obligation to pay Rs.5,000/- per month to the Respondent and the Respondent is entitled to adjust the said amount in the instalments payable by the Appellant to the Respondent. Admittedly, even till filing of Suit i.e. till August 2008, the flat was not ready. Therefore, the said amount of compensation towards delay is more than Rs.3,00,000/-. The Respondent has deposited entire balance payment in the learned Trial Court after filing of Suit.

10. Mr. Kanetkar has failed to point out that the said finding regarding readiness and willingness is contrary to the evidence on record. Therefore, there is no substance in the first substantial question of law raised by Mr. Kanetkar.

11. As far as second substantial question of law regarding limitation, Clause 3 provides that the Defendant will handover possession of the flat to the Plaintiff on or before 31st May 2003. It further records that the Defendant shall complete the construction of the said flat within a period of 18 months. It is further provided that if owner-developer fails to complete the

construction and handover vacant and peaceful possession within the stipulated time i.e. within 18 months from execution of the agreement, the owner-developer shall pay Rs.5,000/- per month to the purchaser for delayed period. It is further provided that the purchaser shall have right to adjust the said amount in the instalments payable by the party of the second part. Clause 4 provides that the grant of completion certificate of the Pune Municipal Corporation in respect of the said flat shall be conclusive proof as to the completion of construction thereof. Clause 5 provides that the party of the first part shall communicate to the party of the second part about the completion of the said flat. It is the admitted position that the Defendant has never communicated to the Plaintiff about completion of the said flat and completion certificate as contemplated under Clause 4 was not issued by the Pune Municipal Corporation till filing of the suit.

12. Article 54 of the Limitation Act, 1963 specifies three years as a period for filing suit for specific performance of a contract. The said period begins to run from the date fixed for the performance, or, if no such date is fixed, when the Plaintiff has notice that performance is refused. Although in the agreement, it is stated that the possession of the flat shall be handed over on or before 31st May 2003, the agreement further contemplates

that the owner-developer shall pay Rs.5,000/- per month to the purchaser for delay in handing over possession. Agreement further specifies grant of completion certificate by the Pune Municipal Corporation, as conclusive proof as to the completion of the construction. The agreement further contemplates that the Defendant to communicate to the Plaintiff about the completion of the said flat. Therefore, it cannot be said that the date mentioned as 31st May 2003 is the last date fixed for performance.

13. Article 54 further contemplates that if no such date is fixed for performance then, when the Plaintiff has noticed that performance is refused, it is the starting point of the limitation. In the present case, admittedly no completion certificate was issued by the Pune Municipal Corporation and in any case, the Plaintiff has never communicated to the Plaintiff about the completion of the said flat. Admittedly till filing of the Suit, the flat was not completed. Both the Courts have concurrently held that the suit is filed within limitation. The said finding is arrived at on the basis of evidence on record. Mr. Kanetkar, learned Counsel appearing for the Appellant failed to point out any perversity in the finding recorded by the Court. Therefore, there is no substance in the second substantial question of law raised by Mr. Kanetkar.

14. As far as third substantial question of law regarding jurisdiction, Mr. Kanetkar submitted that the suit filed is between the landlord and tenant and therefore the Civil Court has no jurisdiction to deal with the said case.

15. Mr. Kanetkar fairly admits that the point regarding jurisdiction is not raised in the written statement. However, relying on the judgment of the Supreme Court in the case of **Sushil Kumar Mehta V. Gobind Ram Bohra (Dead) through His LRs¹**, he submits that a decree passed by a Court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a *coram non judice*. A decree passed by such a court is a nullity and is *non est*. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Therefore, he submits that point of jurisdiction can be raised even at the stage of Second Appeal.

16. Perusal of the written statement filed by the Appellant shows that the point of jurisdiction is not at all raised. However, it is very important to note that the Defendant has come up with a case that the Defendant was in need of money to execute the proposal regarding development of the said property and

¹ (1990) 1 SCC 193

therefore the Defendant was collecting funds from available sources. It is further contended that as the Plaintiff offered to provide finance of Rs.50,000/- subject to execution of an agreement of sale of flat showing receipt of Rs.65,386/-, the agreement was executed. The said contention raised can be specifically seen from the paragraph 2 of the written statement, which reads as under:

"2. It is true that this defendant is owner of CTS No. 543A, 543B and 545 Shivaji Nagar, Pune 05. It is also true that the defendant intended to develop above property. **This defendant was in need of money to execute the proposal regarding development of above property. He was collecting funds from available sources. The Plaintiff is acquainted with the defendant. The Plaintiff offered to provide finance to the defendant of Rs.50,000/- (Rupees Fifty Thousand only) subject to execution of agreement of sale of flat showing receipt of Rs.65,386/- (Rupees Sixty Five thousand three hundred eighty six only). The agreement had to state price of flat of Rs.4,35,910/- (Rupees Four Lakhs thirty five thousand nine hundred ten only). However, the agreement was to be for security and on return of the advance it was to stand, cancelled.** The Plaintiff did not agree to include this condition in the agreement asking the defendant to trust his word. **The Defendant was in need of money and therefore executed suit agreement dated 22.10.2001.** However, the agreement was not meant for specific performance."

(Emphasis added)

It is further pertinent to note that the Defendant has not entered into witness box and has not lead any evidence.

17. The agreement of sale describes the Defendant as owner-developer and Plaintiff as purchaser. Thus the Suit has been filed by the Plaintiff in his capacity of the flat purchaser. It is the contention of the Defendant that the said agreement was executed as security for the loan advanced by the Defendant. Thus none of the parties have come up with the case that the suit is between the Plaintiff and the Defendant in their capacity as the landlord and tenants. Therefore, there is no substance in the third substantial question of law raised by Mr. Kanetkar.

18. For the above reasons, the Second Appeal is dismissed with no order as to costs.

19. In view of dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also disposed of.

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(MADHAV J. JAMDAR, J.)