

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 269 OF 2023
WITH
INTERIM APPLICATION NO. 4684 OF 2023**

Art Constructions Through

Its Partner Ajit Makbul Bagban & Ors.

.. Appellants

Versus

Anil Ramlal Agarwal & Ors.

.. Respondents

...

Mr. Siddharth C. Wakankar, for the Appellants.

Mr. Sudhir Sadavarte, for the Respondents.

...

CORAM : SANDEEP V. MARNE J.

DATED : 1 FEBRUARY 2024.

P. C.:-

1) Appellants have filed the present Appeal challenging the Judgment and Decree dated 17 December 2022 passed by Ad Hoc District Judge-4, Pune in dismissing Regular Civil Appeal No. 68 of 2016 and confirming the Judgment and Decree dated 15 February 2012 passed by Civil Judge Senior Division, Pune in Special Civil Suit No. 794 of 2008.

2) Plaintiffs are the owners of suit property bearing CTS No. 582-A admeasuring 74.8 sq. mtrs. situated at Raviwar Peth, Pune. Plaintiffs purchased the same vide registered Sale-Deed dated 29 August 2000.

It appears that substantial portion of the suit property was occupied by tenants. Appellants/Defendants are Developers and had expressed willingness to develop the suit property. Accordingly, the Plaintiffs and Defendants entered into Development Agreement dated 23 November 2005 for developing the suit property. Defendants agreed to pay consideration of Rs.16,00,000/- to the Plaintiffs in addition to allotting shop admeasuring 200 sq.ft. on consideration of Rs.500 per sq. ft. On execution of the Development Agreement, Defendants paid an amount of Rs.11,000/- to the Plaintiffs and the balance amount of Rs. 14,89,000/- (after adjusting Rs.1,00,000/- towards purchase of shop admeasuring 200 sq. ft.) was to be paid phase-wise, depending upon progress of the construction. According to the Plaintiffs, Defendants failed to act on the agreement within the time stipulated therein and accordingly Plaintiffs issued Notice dated 8 December 2007 and cancelled the Development Agreement.

3) Plaintiffs thereafter filed Special Civil Suit No. 794 of 2008 in the Court of Civil Judge, Senior Division, Pune on 22 April 2008 seeking a declaration that the Development Agreement dated 23 November 2005 stood cancelled as well as seeking injunction against Defendants from doing any act in pursuance of the Development Agreement dated 23 November 2005. Plaintiffs also prayed for compensation at the rate of Rs. 25,000/- per month during the period from 23 November 2005 to 22 November 2007. Defendants appeared in the suit and filed Written Statement-cum-counterclaim seeking specific performance of the Development Agreement. The Trial Court has decreed Plaintiff's suit on 15 February 2012 declaring that the Development Agreement and Power of Attorney dated 23 November 2005 stood cancelled. The Trial Court dismissed the counterclaim filed by Defendants. Aggrieved by the Trial Court's decree, Defendants filed Regular Civil Appeal No. 68 of 2016 before District Court,

Pune which has been dismissed vide Judgment and Decree dated 17 December 2022. Aggrieved by the decisions of the Trial Court and the first Appellate Court, Appellant has filed the present Appeal.

4) I have heard Mr. Wakankar the learned counsel appearing for Appellant and Mr. Sadavarte, the learned counsel appearing for the Respondents.

5) After having considered the submissions canvassed by the learned counsel appearing for the parties, it is seen that the Development Agreement dated 23 November 2005 contemplated Defendants to develop the suit property upon fulfillment of two conditions *viz* (i) procurement of Development Permission from Pune Municipal Corporation and (ii) obtaining written consents from tenants. The parties agreed that obtaining possession from tenants was a tough job requiring some time. The responsibility of procuring development permission and obtaining possession from tenants rested on shoulders of Defendants. Though the agreement records that the exact time required for procurement of development permission and for obtaining possession from tenants could not be ascertained, Plaintiffs granted maximum possible time for completion of the said two activities. Accordingly, parties agreed that both the conditions of obtaining development permission and seeking possession from tenants must be completed within maximum time of 24 months. It is an admitted position and within the said period of 24 months, Defendants fulfilled only one out of the two conditions and obtained Development permission from Municipal Corporation on 3 July 2007. He could not obtain possession from any of the tenants. The Trial Court and the first Appellate Court have therefore arrived at a finding that the mandatory conditions of the agreement were not fulfilled by the Defendants and that time was the essence of the contract.

6) Though in ordinary course, time cannot be said to be the essence of contract for sale of immovable property, the peculiar facts of the present case depicts that Defendants locked the property of the Plaintiffs for over two years on payment of minuscule amount Rs.11,000/-. The Plaintiffs were therefore justified in terminating the Agreement on 8 December 2007. Plaintiffs were not supposed to wait endlessly for Defendants to commence development of the suit property. The consideration agreed under the agreement was payable phase-wise depending upon progress of the construction. Defendants paid meagre amount of Rs.11,000/- to the Plaintiffs and agreed to pay the balance amount of Rs.14,89,000/- and allot shop admeasuring 200 sq. ft. after adjusting concessional consideration of Rs.1,00,000/- from the total consideration of Rs.16,00,000/-. Considering the rapid appreciation of prices of immovable properties at the relevant time, Defendants were enriching themselves by locking the property without paying any substantial amount of consideration. On the contrary Plaintiffs were suffering with no development taking place at the site. In the facts and circumstances of the present case, time has rightly been construed as essence of the contract. Nothing is brought on record to indicate any efforts on the part of Defendants to obtain consent of even a single tenant or to secure possession from them. Defendants apparently did not obtain possession from tenants possibly with a view to save liability to pay transit rent to them. Defendant thus had nothing to loose by whiling away time. It is thus more than apparent that Defendants locked the suit property by paying minuscule consideration of Rs.11,000/- for a considerable period of time.

7) After appreciation of evidence on record, the Trial Court and the first Appellate Court have rightly held Defendants responsible for non-performance of the contract. Plaintiff's suit has rightly been decreed partly and Defendants' counterclaim has rightly been rejected. No substantial

question of law is involved in the Appeal. The Second Appeal is accordingly rejected.

8) In view of the rejection of the Second Appeal, Interim Application No.4684 of 2023 does not survive and the same is also disposed of.

[SANDEEP V. MARNE J.]