



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 33 OF 2006

1) Pramod S/o Bhauraoji Mahajan,
Aged about 22 years,
Occupation – Cultivator.

2) Bhaurao S/o Barbaji Mahajan,
Aged about 50 years,
Occupation – Cultivator,

Both R/o. Pawani,
Post Sirasgaon (Bazar),
Tahsil Hinganghat, District Wardha.

.... **APPELLANTS**

// VERSUS //

Rajendra S/o Kisnaji Mahajan,
Aged about 30 years,
R/o. Pawani, Post Sirasgaon (Bazar),
District – Wardha.

.... **RESPONDENT**

Mr. M.M. Agnihotri, Advocate for Appellants.
Mr. A.V. Lokhande, Advocate for Respondent.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 20.06.2024.
DATE OF PRONOUNCING THE JUDGMENT : 28.06.2024.

JUDGMENT.

1. This second appeal is preferred against the Judgment and Decree passed by the 2nd Ad-hoc Additional District Judge, Wardha in

Regular Civil Appeal No.127/2001 dated 18.08.2005, which was preferred against the Judgment and Decree passed by the learned Civil Judge, Junior Division, Hinganghat, District Wardha in Regular Civil Suit No.5/1996, dated 25.06.2001. The parties are referred to their original status.

PLAINTIFF'S CASE

2. The plaintiff is owner of the suit property bearing Survey No.260/2, admeasuring 1.10 HR., situated at village Pawani, Tahsil Hinganghat, District Wardha. A contract to sale on a stamp-paper at Exhibit No.27 of the suit property dated 20.03.1991 was executed between plaintiff and defendant No.1, for the consideration amount of Rs.30,000/-. That time Rs.20,000/- out of consideration amount was paid to the plaintiff. The defendant No.1 is son of defendant No.2. The possession of the suit property was handed over to the defendants. The remaining amount of Rs.10,000/- was agreed to be paid on or before 15.03.1992 and, thereafter, sale-deed was to be executed. The plaintiff was ready and willing to execute the sale-deed, but defendant No.1 was not having remaining amount of consideration with him. The plaintiff requested him and insisted for the execution of sale-deed. He was not ready and willing to perform his part of contract. Therefore, sale-deed was not executed. The

plaintiff sent a notice (Exhibit-28) to the defendants for execution of sale-deed. Defendant No.1 sent a reply to the said notice (Exhibit-66) and contended that he is ready to pay the remaining consideration amount. He communicated to the plaintiff to deposit the loan amount of the Co-operative Society, Pawani taken on the said land. It is averred that the defendants did nothing thereafter. Therefore, the plaintiff filed the suit for possession of the suit property.

DEFENDANTS' CASE

3. The Defendants contended that they were ready to get execute a sale-deed, but the plaintiff prolonged and avoided to execute it. At the time of marriage of plaintiff, in the year 1992, he took Rs.3,000/- from the defendants. That time defendants asked to a plaintiff to execute the sale-deed, but the plaintiff said that 'they are relatives of each other's and the sale-deed can be executed at any time', however, it was not executed deliberately. The defendants are ready to execute the sale-deed by paying remaining amount of consideration. There is no recital as condition of forfeiture of earnest money in the contract to sale. A loan amount of Co-operative Society was not paid by the plaintiff. The plaintiff agreed to bring no due certificate from the Co-operative Society, he did not secure it.

Thereafter, the defendant No.1 was ready to execute the sale-deed. It was not brought. It is lastly prayed to dismiss the suit.

JUDGMENTS OF TRIAL & APPELLATE COURT

4. The learned Trial Court dismissed the suit. The learned First Appellate Court allowed the appeal and set aside the Judgment and decree of the trial Court and decreed the suit.

SUBSTANTIVE QUESTION OF LAW

5. The following question of law is formed by this Court :

Whether the suit filed by the plaintiff for possession of the suit property was maintainable when, admittedly, an agreement of sale was executed between the plaintiff and the defendants, and it was not the case of the plaintiff that the contract between the parties was rescinded and/or the plaintiff had not sought a declaration that the agreement of sale executed between the parties was rescinded?

ADMITTED FACTS

6. Admitted facts are that the plaintiff and defendant No.1 have executed the contract to sale of suit property on 20.03.1991, the sale-deed was to be executed on or before 15.03.1992, but it was not executed, the suit for possession of the suit property was filed by

plaintiff on 15.01.1996, the defendant No.1 did not file suit or counter-claim for specific performance of contract or suit for recovery of consideration amount paid to a plaintiff. It is also admitted fact that the plaintiff issued notice as per Exhibit No.28 to the defendants and defendants have replied to these notices as per Exhibit Nos.65 and 66.

ARGUMENTS

7. The learned Advocate for the defendants submitted that the plaintiff has not prayed for rescission of contract and for declaration that contract to sale is not binding upon him. Therefore, bare suit for recovery of possession of the suit property is not maintainable. He submitted that defendants are entitled to retain possession of the suit property in view of Section 53A of the Transfer of Property Act, 1982 (for short the "T.P. Act") as held by the trial Court. He supported the judgment of the trial Court.

8. Learned Advocate for the defendants is relying upon the following authorities :

(i) ***Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and another***, reported in ***AIR 1977 SC 1005***, in which it is held that the fixation of the period within which the contract has to be performed

does not make the stipulation that time is essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. The intention to treat time as the essence of the contract can be inferred by circumstances which should be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

(ii) ***Balasaheb Manikrao Deshmukh & Anr. Vs. Rama Lingoji Warthi***, reported in ***2001(1) Mh.L.J. 79***, in which it is held that no distinction can be made between the case where the purchaser has filed suit for specific performance and has failed on the point of limitation and a case where purchaser has not filed any case but the suit has become time barred. Suit for possession filed by the vendor dismissed.

(iii) ***Shrimant Shamrao Suryavanshi & Anr. Vs. Pralhad Bhairoba Suryavanshi (Dead) by LRs. & Ors.***, reported in ***(2002) 3 SCC 676***, wherein it is held that law of limitation does not apply to a plea taken in defence by defendant even though by that defence claim made by him may not be enforceable in the court being barred by limitation.

(iv) ***Mahadeva & Ors. Vs. Tanabai***, reported in ***(2004) 5 SCC 88***, wherein it is held that merely because the suit for specific performance at the instance of the vendee has been barred by limitation that by itself is not enough to deny the benefit of the plea of part-performance of contract to sale to protect the possession.

9. The learned Advocate for the plaintiff submitted that a suit or counter-claim for specific performance of contract or recovery of consideration amount is not filed by the defendant No.1. He did not enter into a witness box to prove his readiness and willingness. He has lost that protection under Section 53A of the T.P. Act also because more than 33 years are over. He argued that :

(i) Defendant No.1 had averred that he was ready to pay remaining consideration amount and to execute the sale-deed. As per the reply to notice at Exhibit-66, he is ready to pay the remaining amount of consideration of Rs.7,000/- on the date of execution of sale-deed. Defendants have averred that willingness, but it is not proved.

(ii) Defendant No.1 did not enter into the witness box to state his intention of readiness and willingness to pay remaining

amount of consideration. Conduct of the defendant No.1 shows that for more than 33 years, he is silent and did not pay remaining amount of consideration. He failed to prove that he was and is ready and willing to perform his part of contract.

(iii) In the absence of pleadings as to the requisites of Section 53A of the T.P. Act, to claim right to retain in possession of the suit property, the defendants cannot claim such equitable right.

(iv) The learned Advocate for the plaintiff is relying upon the following authorities :

(A) *A Lewis and Anr. Vs. M. T. Ramamurthy and Ors.*, reported in *(2007)14 SCC 87*, wherein it is held that transferee kept quiet and remained passive without taking effective steps, he is not entitled for benefit under Section 53A of the T.P. Act. He must perform his part and convey willingness to perform it.

(B) *Vasanthi Vs. Venugopal (Dead) through LRs.*, reported in *(2017) 4 SCC 723*, wherein it is held that transferee failed to show that he had performed or was willing to

perform his part of contract is not entitled to the benefit under Section 53A of the T.P. Act.

REASONS

10. Admittedly, the sale-deed was to be executed on or before 15.03.1992. However, in case of immovable property, time is not essence of contract unless it is contract of commercial property. But defendant No.1 has not filed suit or counter claim for specific performance of contract therefore, law laid down in the case of ***Govind Prasad Chaturvedi*** cited *supra* is not helpful to the defendant No.1.

11. Defendant No.1 must plead and prove that he was ready and willing to perform his part of the contract as contained in Exhibit-27. The intention of the parties can be gathered from contract to sale Exhibit-27. It shows that defendant No.1 was agreed to pay remaining consideration amount on or before 15.03.1992. Time was not essence of contract. However, he had not pay that amount within a reasonable time till today also.

12. The admitted and decisive fact is that defendants agreed to pay remaining consideration amount of Rs.10,000/-. A burden lies

upon the defendant No.1 to prove his readiness and willingness to pay Rs.10,000/- the remaining consideration amount. To prove the readiness and willingness, defendant No.1 did not enter into the witness box to state the facts which were perceived by him regarding contract to sale Exhibit-27 and incident occurred thereafter. He did not adduce his oral evidence and no any special reason is given for its justification. His father defendant No.2 though deposed, did not state in his evidence that he is deposing for the defendant No.1. This conduct of defendant No.1 shows that he avoided to face the cross-examination of the plaintiff which may go adversely against him and reality would emerge. Mere taking stand in written statement and examining his father defendant No.2 is sufficient to prove his readiness and willingness. The defendant No.1 had not entered into the witness box deliberately therefore, an adverse inference can be drawn safely against him as per the illustration (g) of Section 114 of the Indian Evidence Act that he was not ready and willing to perform his part of contract by paying the remaining consideration amount within reasonable time. He had only sent reply to notice of the plaintiff at Exhibit-66. As per the recitals of the notice para No.4, the defendant No.1 took defence that there was loan of the Co-operative Society, Pawani, taken by the plaintiff, about which defendant

requested to the plaintiff to clear it. But thereafter defendant No.1 remained silent and done nothing till today.

13. From the previous and subsequent conduct of the defendant No.1 noted above, though the time was not essence of contract, it can be safely inferred that defendant No.1 failed to prove one of the essential ingredient of Section 53A of the T.P. Act i.e. his readiness and willingness to pay that remaining consideration amount to the plaintiff within a reasonable time.

14. The defendant No.1 demanded no objection from the father and other family members of plaintiff. No any objection was raised by the relatives of the plaintiff for execution of sale-deed. The plaintiff is exclusive owner of suit property. There was no any hurdle for him to execution of sale-deed. Therefore, claiming their no objection for execution of sale-deed is only attempt on the part of defendant No.1 to avoid liability to pay that remaining amount of consideration. The reply notices given by the defendants at Exhibit Nos.65 and 66, show their conduct that they have taken very unreasonable stand that to bring no due certificate and no objection of the family members etc. Even after filing of the suit by plaintiff, defendant No.1 has not filed suit for specific performance of contract

to establish readiness and willingness to pay that remaining amount of consideration. The defendant No.1 did not pray before the trial Court or First Appellate Court for depositing it to show his willingness. Thus defendant No.1 failed to establish his readiness and willingness to perform his part of contract as held above for the purpose of claiming his right under Section 53A of the T.P. Act. He by his conduct of inaction as well as not responding to the plaintiff's notice positively to comply the terms of contract Exhibit-27, which is relevant under Section 8 of the Indian Evidence Act, he extinguished his equitable rights to retain possession of suit property created under the contract to sale Exhibit-27. The breach of contract is committed by defendant No.1's subsequent conduct of inaction after the execution of contract to sale at Exhibit-27. The defendant No.1 did not prove his readiness and willingness to pay and execute the sale-deed. Therefore, no onus lies upon the plaintiff to disprove the defence evidence particularly oral evidence of the defendant No.2 about readiness and willingness, who was not party to the contract to sale of the suit property. The evidence of defendants witnesses if accepted as proved, which shows that Rs.3,000/- were paid. But it is not sufficient to infer that defendant No.1 was ready to pay remaining Rs.7,000/- to the plaintiff.

15. As held above, defendant No.1's right to protect his possession under Section 53A of the T.P. Act is not created because of conducts of inaction and avoiding to execute the sale-deed. The right to file suit for possession of suit property was legally accrued to the plaintiff due to the unreadiness and unwillingness to pay remaining amount of consideration on the part of defendant No.1. The plaintiff's liability to execute sale-deed is legally not in existence and it is extinguished by the conduct of defendant No.1. Defendant No.1 was having only right to recover that consideration amount paid by him from plaintiff. There is no such prayer of the defendant No.1. The civil mischief of refusing to perform the part of contract i.e. breach of contract on the part of defendant No.1 is proved. The plaintiff is having title to the suit property and as per Section 5 of the Specific Relief Act, 1963 he is entitled for the possession of it.

16. The defendants raised defence that other prayers for rescission of contract or for declaration that it is rescinded are not made in the plaint. It is not requirements of law to pray for such relief and only filing of suit for possession on the basis of title is sufficient. The suit is maintainable only for claiming possession of the suit property. When defendants possession is not legal as they have no any right to retain it. It is not pointed out as to what

prejudice is caused to the defendants only because plaintiff did not pray for rescission of contract and declaration. It does not cause prejudice to the defendant No.1.

17. There is no specific pleading of defendant No.1 that he claims equitable right to retain possession of the suit property under Section 53A of the T.P. Act. However, the learned trial Court framed issue No.4 regarding right under Section 53A of the T.P. Act. The trial Court erred in law and failed to consider basic principle of civil trial that one has to first plead and then prove the material of facts in issue. The defendant No.1 failed to plead specifically and prove his right under Section 53A of the T.P. Act. As per order 7 Rule 7 of the Code of Civil Procedure, 1908 defendant No.1 has to plead the relief specifically. It is not pleaded by defendant No.1.

18. The learned trial Court erred in dismissing the suit by holding that under Section 53A of the T.P. Act, defendants possession over the suit property is to be protected. A defendant No.1 failed to plead and prove the essential ingredient of part performance of contract that he was ready and willing to perform his part of contract. The First Appellate Court has rightly concluded in para No.13 of the impugned judgment that defendants failed to establish their defence of readiness and willingness. No interference is

warranted in it. The reasons and findings of the First Appellate Court are found legal and correct. Therefore, no interference is warranted in the impugned Judgment and decree. For the reasons discussed above, the argument of the learned Advocate for the defendants is not accepted and case laws cited *supra* by them are also not applicable and not relied upon. Hence, substantial question of law is answered in the 'Negative'. The appeal deserves to be dismissed. The Appeal is **dismissed**. No costs.

(SANJAY A. DESHMUKH, J.)

The learned Advocate for the defendants submits that this Court has granted stay to the execution of the impugned judgment and decree. He prayed four weeks time for continuation of the said stay order. In view of his submission, the stay already granted is extended for further four weeks.

(SANJAY A. DESHMUKH, J.)