



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 438 OF 1994

Keshav s/o Madhavrao Dhumal
(Deceased through LRs)

- 1A Shri Madhav s/o Keshavrao Dhumal
age 41 years, occ. Agri.
- 1B Shri Shivaji Keshavrao Dhuman
age 39 years, occ. Agril.
- 1C Shri Sahebrao s/o Keshavrao Dhumal
age 33 years, occ. Agri.
- 1D Shri Bhagwan s/o Keshavrao Dhumal
age 30 years, occ. Agri.
- 1E Sau. Bharatibai w/o Jyotiram Kadam
(Deceased through LRs)
 - 1E-1 Jyotiram s/o Deorao Kadam
age 75 years, occ. Retired.
 - 1E-2 Digambar s/o Jyotiram Kadam
age 45 years, occ. Service.
 - 1E-3 Audumbar s/o Jyotiram Kadam
age 35 years, occ. Service
 - 1E-4 Suvidya w/o Pawan Patil
age 40 years, occ. Retired.
 - 1E-5 Manisha w/o Digambar Kadam
age 40 years, occ. Retired.
 - 1E-6 Suchita w/o Audumbar Kadam
age 32 years, occ. Retired

All r/o "Sangram Smruti"

Mantri nagar, Sootmill Road,
Latur.

1F Sau. Manisha w/o Vidyadhar Shinde
age 28 years, occ. Household

All r/o Shedol, Tq. Nilenga
Dist. Latur.

.. Appellants

versus

1. Dnyandeo s/o Shamrao Rajput
(Deceased through LRs)

1A Balaji s/o Dnyandeo Rajput (Parihar)
age 57 years, occ. Agri.

1B Sham s/o Dnyandeo Rajput (Parihar)
age 45 years, occ. Agri

Both r/o Chalburga, Tq. Ausa
Dist. Latur.

1C Kushabai w/o Laxman Taur
age 62 years, occ. Household
r/o Banegaon, Tq. Ausa, Dist. Latur

2. Nagorao s/o Madhavrao Rajput
(Deceased through LRs)

2A Laxmibai w/o Nagorao Rajput (Parihar)
age 75 years, occ. Household.

2B Babruvahan s/o Nagorao Rajput (Parihar)
age 55 years, occ. Agril.

2C Pratap s/o Nagorao Rajput (Parihar)
age 45 years, occ. Agri

2D Kaka s/o Nagorao Rajput (Parihar)
age 43 years, occ. Agri

2E Lahubai w/o Dattatraya Chavan
age 57 years, occ. Household

All r/o Chalburga, Tq. Ausa
Dist. Latur.

2F Sushila w/o Balaji Kachhave
age 47 years, occ. Household
r/o Lanji, Tq. Ahmedpur, Dist. Latur.

.. Respondents

Mr. A. S. Shelke, Advocate for the appellants.

Mr. P. D. Suryawanshi, Advocate holding for Mr. S. T. Jadhav,
Advocate for the Respondents.

CORAM : R. M. JOSHI, J.

RESERVED ON : 17th FEBRUARY, 2025.

PRONOUNCED ON : 21st FEBRUARY, 2025.

JUDGMENT :

1. Original Defendant in Regular Civil Suit No. 271/1977 has preferred this appeal under Section 100 of Code of Civil Procedure taking exception to the judgment and decree of specific performance of contract passed therein and confirmation thereof by First Appellate Court in Regular Civil Appeal No. 158/1985 by order dated 10.11.1981.

2. Parties are referred to as Plaintiffs and Defendant for the sake of convenience.

3. It is the case of the Plaintiffs that Defendant is the owner of the land bearing Survey No. 52 (New Survey No. 46) situated at Wagholi, Tq. Ausa. It is further averred that there was an agreement of sale executed between Plaintiffs and Defendant on 13.03.1964 whereby Defendant had agreed to sell land admeasuring 18 Acres 10 R from Survey No. 52 on payment of total consideration of Rs. 6,000/-. It is their further case that at the time of execution of agreement to sale, a sum of Rs. 5,500/- was paid to Defendant as earnest money. The balance consideration was to be paid at the time of execution of the sale-deed. Since at the relevant time, there was restriction for sale of the suit land without prior sanction from the competent authority under Hyderabad Tenancy and Agricultural Lands Act (for short 'HTAL Act'), a condition was included in the agreement to sale that the sale-deed would be executed after obtaining permission from the competent authority. It is the case of the Plaintiffs that in the year 1965-1966, a condition of permission before effecting sale of the suit land was removed and hence the Plaintiffs time and again approached the Defendant with a request of accept balance consideration of Rs. 500/- and to execute sale-deed. It is alleged by the Plaintiffs that Defendant did not accept the balance consideration and failed to execute sale-deed. The suit came

to be filed as Defendant finally refused to accept balance consideration and infact issued notice dated 17.11.1977 to the Plaintiffs revoking agreement to sale. In the plaint, it is claimed that notice of termination of issued by Defendant is not valid.

4. Defendant, by filing written statement, though accepted execution of agreement to sale however, it is denied that he has received amount of Rs. 5,500/- as alleged by Plaintiffs by way of earnest money. It is his specific case that he received only Rs. 2,500/- at the time of execution of the agreement. He further contends that affidavit was obtained by Plaintiffs from Defendant for submission to the competent authority for seeking permission for sale of the suit land. It is denied by Defendant that Plaintiffs have ever approached him with a request to accept balance consideration and on the contrary it is alleged that Defendant was time and again approached the Plaintiffs for payment of consideration, which they failed to concede. It is claimed that the agreement to sale is repudiated by notice dated 17.11.1977 and as such Plaintiffs are not entitled for any relief of specific performance. Counter claim is filed by the Defendant for seeking possession of the suit land.

5. Learned Trial Court framed issues at Exhibit 28. Plaintiffs and defendants led oral as well as documentary evidence. Learned Trial Court accepted the contention of Plaintiffs and decreed the suit by holding that the suit is filed within limitation so also the notice of termination of agreement to sale issued by Defendant is not valid. Being aggrieved by said judgment and decree, Defendant filed appeal being Regular Civil Appeal No. 158/1985 unsuccessfully. Hence, this appeal.

6. Learned counsel for Defendant submits that though technically it can be said that the suit is filed within the period of limitation, both the Courts below were under obligation to decide whether there is delay and laches on the part of Plaintiffs in filing the suit. It is his contention that mere filing of the suit within limitation will not entitle the Plaintiffs to relief of specific performance of contract. It is submitted that the agreement to sale is executed in the year 1964 whereas the suit came to be filed in the year 1977. Thus, according to him, when the suit is filed after 14 years of the execution of agreement to sale, it cannot be said that the Plaintiffs are entitled for decree of specific performance of contract. To support his submission, he placed reliance on judgments of Hon'ble Supreme

Court in case of Mrs. Saradmani Kandappan vs. Mrs. S. Rajlakshmi and others, **2011 AIR SCW 4092** and P. Daivasigamani vs. S. Sambandan, **2022 DGLS (SC) 1353**. It is his next contention that there is termination of agreement by the Defendant and unless the said termination is challenged and set aside, Plaintiffs are not entitled to maintain the suit for specific performance of contract. It is his submission that there is no prayer in the plaint for setting side termination of agreement and in absence thereof, the suit must fail and it be dismissed. To support his submission, he placed reliance on judgments in case of I. S. Sikandar (D) by LRs vs. K. Subramani, **2013 DGLS (SC) 696**, Mohinder Kaur vs. Sant Paul Singh, **2019 DGLS (SC) 1291** and R. Kandasamy (D) and others vs. T. R. K. Sarawathy and another, **2024 DGLS (SC) 1158**.

7. Learned counsel for Plaintiffs, on the other hand, supported the impugned judgments and decree with the contention that there are concurrent findings recorded by both the Courts below and it is not permissible for this Court while entertaining second appeal to cause any interference therein. It is his submission that the Plaintiff in the plaint has specifically taken exception to the validity of the notice of termination issued by Defendant and the

learned Trial Court had also framed issue to that effect. It is his submission that on the basis of evidence on record, it is held that the said notice of termination is not valid. Thus, according to him, once it is held that termination of agreement to sale is not valid, there is no impediment for the Plaintiffs to seek relief of specific performance of contract. It is his further submission that the suit for specific performance cannot be dismissed solely on the ground of delay and laches and the Court is required to take into consideration the overall facts and circumstances of the case. To support his submission, he placed reliance on judgment of Hon'ble Supreme Court in case of Mrs. A. Kanthamani vs. Mrs. Nasreen Ahmed, **2017(2) MLJ 632**.

8. This appeal came to be admitted on 13.03.1995 on the substantial question of law regarding discretion exercised by the Courts below under Section 20 of Specific Relief Act.

9. There is no dispute about the fact that Defendant is the owner of the suit property and that he agreed to sell the same to Plaintiffs and accordingly agreement to sale came to be executed on 13.03.1964. The said transaction was settled at total consideration of Rs. 6,000/-. It is the case of the Plaintiffs that amount of Rs.

5,500/- was paid to the Defendant at the time of execution of agreement to sale and earnest money receipt is also obtained from him. Agreement to sale (Exhibit 34) and earnest money receipt (Exhibit 35) indicate that out of total consideration of Rs. 6,000/-, a sum of Rs. 5,500/- was paid to the Defendant by Plaintiffs. Though Defendant has sought to contend that only sum of Rs. 2,500/- was received at that time, however, evidence on record indicates that he had received amount of Rs. 5,500/-. There is further corroborative evidence in form of affidavit executed by Defendant to confirm said fact. Thus, findings of fact are recorded by the Courts below to the effect that there was execution of agreement to sale by Defendant and out of total consideration of Rs. 6,000/- a sum of Rs. 5,500/- was received by him from Plaintiffs.

10. There cannot be any two opinions with regard to the settled position of law that as far as contract of sale of immovable property is concerned, time is not essence of contract unless it is so agreed by the parties in the agreement to sale or even by their conduct it can be assumed so.

11. In the instant case, admittedly, termination of agreement to sale was effected by Defendant by notice dated 17.11.1977. Article 113 of the Limitation Act prescribes period of three years of limitation after the vendor refuses to perform his part of the contract. Thus, it cannot be said that the suit is filed beyond period of limitation. Now, question arises as to whether Plaintiffs would be entitled to relief of specific performance only for the reason that suit is within period of limitation. At this stage, it would be relevant to consider the judgment of Hon'ble Supreme Court in case of Mrs. Saradmani (supra) whereby by relying upon the earlier decision of Hon'ble Supreme Court it is held thus :-

19. The legal position is clear from the decision of a Constitution Bench of this court in [Chand Rani v. Kamal Rani](#) [1993 (1) SCC 519], wherein this court outlined the principle thus:

"It is a well-accepted principle that in the case of 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 rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained

whether under the terms of the contract 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."

Relying upon the earlier decisions of this court in [Gomathinayagam Pillai v. Pallaniswami Nadar](#) [1967 (1) SCR 227] and [Govind Prasad Chaturvedi v. Hari Dutt Shastri](#) [1977 (2) SCC 539], this [Court further held](#) that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract.

Thereafter this court held that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time : (i) from the express terms of the contract; (ii) from the nature of the property and (iii) from the surrounding circumstances as for example, the object of making the contract. The intention to treat time as the essence of the contract may however be evidenced by circumstances which are sufficiently strong to displace the normal presumption that time is not the essence in contract for sale of land. In Chand Rani, clause (1) of the agreement of sale required the balance consideration to be paid as under:

"Rs.98,000/- will be paid by the second party to the first party within a period of ten days only and the balance Rs.50,000 at the time of registration of the sale deed....". This court held that time regarding payment of Rs.98,000 was the essence, on the following reasoning:

"The analysis of evidence would also point out that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room on the ground floor was given. In cross-examination it was deposed that since income-tax clearance certificate had not been obtained the sum of Rs. 98,000 was not paid. Unless the property was redeemed the payment would not be made. If this was the attitude it is clear that the plaintiff was insisting upon delivery of possession as a condition precedent for making this payment. The income-tax certificate was necessary only for completion of sale. We are unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs. 98,000. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under Clause (1) of the suit agreement."

The intention to make time stipulated for payment of balance consideration will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale,

set out in the agreement. If for example, the vendor discloses in the agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need (say medical or educational expenses of a family member) time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract.

12. In case of P. Daivasingamani (supra) in paragraph No. 20, it is held thus :-

“20. Time, it is stated, is not the essence of the contract in the case of immovable properties, unless there are grounds to hold to the contrary. This doctrine is applied, without being unfair and inequitable to the defendant/seller, as the court should not ignore that a person sells the property when he needs money, and, therefore, expects the money in the stipulated or reasonable time, which would meet the purpose of the sale. The purpose of sale can vary from the need for liquid cash to be invested to earn interest, medical, educational, child’s marriage or purchasing another property. To save capital gains, the seller has to purchase

another immovable property, unless the proceeds are exempt. There has been a steep rise in the prices of land in the last quarter of the 20th Century in India. With the rise in property value, the value of money has fallen. At times, delay in payment would defeat the defendant/seller's purpose. Therefore, the offer of the plaintiff/purchaser in writing and the time and occasion when the offer to pay the balance amount to the defendant/seller is an important factor which would matter when the court examines the question of discretion, that is, whether or not to grant a decree of specific performance. While examining these aspects, the quantum of money paid by the plaintiff/seller to the defendant/purchaser may become a relevant fact that merits due consideration. There is a distinction between limitation and delay and laches. Limitation is a ground for dismissing a suit even if the plaintiff is otherwise entitled to specific performance, while delay operates to determine the discretion and exercise under [Section 20](#) of the Specific Relief Act, even if the suit is not dismissed on account of limitation. However, not one but several aspects have to be considered when the court, in terms of [Section 20](#) of the Specific Relief Act, exercises discretion, guided by judicial principles, sound and reasonable.

13. The position of law as settled by the Hon'ble Supreme Court therefore clearly shows that in respect of sale of immovable

property time is never regarded as essence of contract and infact there is presumption against time being essence of contract. Similarly, mere delay alone is not sufficient to refuse the decree of specific performance and that all attending circumstances are required to be taken into consideration by the Court for grant or refusal thereof. In the instant case, perusal of agreement to sale (Exhibit 34) does not indicate that time was essence of contract. It is stated therein that the sale-deed would be executed after obtainment of permission from the competent authority under the act. Admittedly, in the year 1965-1966, the permission was no more required for such transaction. It was within the knowledge of the Plaintiffs that no such permission is required. In this backdrop, it is the case of the Plaintiffs that time and again they were approaching the Defendant with a request of accept balance consideration and execute sale-deed and he used to give assurances in that regard. On the other hand, it is the case of the Defendant that he was approaching the Plaintiffs for seeking balance consideration and had shown readiness to perform his part of the contract.

14. Undeniably, the period of 14 years has lapsed in between agreement to sale and filing of the suit for specific performance of

contract. There is no dispute about the fact that at the time of agreement to sale, Defendant had received more than 90% of the consideration amount from Plaintiffs. Plaintiffs were put into possession of the suit property. Now there is word against word that Plaintiffs claim that they approached the Defendant whereas Defendant claims otherwise. The issue in question therefore required to be decided from the other circumstances to accept the contention of either side. The Plaintiffs have paid consideration of more than 90% and were put in possession of suit property. If Plaintiffs failed to pay balance consideration, Defendant would not wait for 14 long years to cancel the agreement. Pertinently, for the period of 14 years, Defendant did not find it necessary to cancel the agreement to sale. This conduct of the Defendants supports the case of Plaintiffs and that there is reason to believe that the Plaintiffs requested him to accept balance consideration and execute sale-deed and assurances were given by him. Pertinently, immediately after actual refusal by Defendant to execute sale-deed, suit came to be filed. Thus, the attending circumstances as they appear from record so also from the conduct of the parties, it can be said that time was never regarded as essence of contract. This Court, therefore, finds no justification in accepting contention of learned counsel for the Defendant that solely

on the ground of delay in filing the suit, Plaintiffs are not entitled for decree of specific performance.

15. The second contention raised by Defendant is failure on the part of the Plaintiffs to challenge termination of agreement to sale. Learned counsel for Defendant has relied upon judgments in case of I.S. Sikandar (supra) and Mohinder Kaur (supra). In the said judgment, the Hon'ble Supreme Court has not doubt held that the Plaintiffs have to seek relief to declare that termination of agreement to sale is bad in law. It is held that in absence of such prayer by Plaintiffs in the original suit, the Trial Court cannot grant decree of specific performance of contract.

16. Here in this case, Plaintiffs in the plaint have specifically taken exception and challenged the validity of termination of contract by raising specific plea that the notice is not binding upon him. Defendant not only filed written statement but also filed counter claim wherein it is averred that he has validly terminated agreement to sale. Learned Trial Court, in view of these pleadings, has framed additional issue in this regard. The additional issue framed on 17.08.1987 reads thus :-

“Does Defendant prove cancellation of agreement as pleaded ?”

17. Now it is sought to be argued on behalf of the Defendant that the Trial Court has wrongly placed burden on the Defendant to prove validity of notice of termination whereas it was the duty and responsibility of the Plaintiffs to challenge and prove the same. Issue was framed by the Trial Court as recorded hereinabove and during entire trial there was no objection raised by the Defendant to the said issue and infact parties led evidence in this regard. In view of filing of the counter claim and since Defendant's claim of relief of re-possession of the property was dependent upon the said contention, so also Plaintiffs claimed that the said notice does not bind them, the Trial Court has rightly framed issue in this manner. Learned Trial Court, after considering the evidence on record, has held that notice of termination issued by the Defendant is not valid. Once said finding of fact is recorded by the Trial Court, there remains no impediment for the Plaintiffs to seek specific performance of contract. There is material difference in the fact of the case cited supra and in the instant case. Once it is held that the notice of termination of agreement to sale issued by the Defendant is not valid, there remains

no reason for denying the decree of specific performance of contract to the Plaintiffs.

18. The Courts below have rightly appreciated the evidence on record and findings of fact are recorded. This Court, in exercise of jurisdiction under Section 100 of Code of Civil Procedure is not inclined to cause interference in the concurrent findings recorded by both Courts below. No perversity is seen in the said findings in order to cause any interference therein. The Trial Court has rightly exercised discretion under Section 20 of Specific Relief Act to grant decree of specific performance of contract. Thus, substantial question of law deserves to be answered accordingly. Appeal being sans merit stands dismissed.

19. Pending application if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb