



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 135 OF 2021

Shridhar S/o Baburao Rithe
Died through his L.Rs.
1/1 Shantabai W/o Shridhar Rithe
and others .. Appellants

Versus

Vilas S/o Vishwanathappa Kherudkar .. Respondent

Shri H. I. Pathan, Advocate for the Appellants.
Shri Milind M. Patil (Beedkar), Advocate for the Respondent.

CORAM : SHAILESH P. BRAHME, J.
DATE : 19TH SEPTEMBER, 2025.

FINAL ORDER :

. Heard both sides.

2. Appellants – original defendants are questioning concurrent findings of facts recorded in decreeing suit for specific performance of contract.

3. The respondent had filed Spl.C.S. No. 61 of 2009 on the basis agreement to sale dated 09.11.2006 at Exhibit 21 and further agreement dated 17.01.2007 at Exhibit 22. Appellants – original defendants proposed to sell suit house to the respondent for consideration of Rs. 29,60,000/-. Both the agreements were executed by appellant No. 1 – Shridhar. The suit house was

allotted to appellant No. 2 – Kisanrao, but it was shown in the record of rights in the name of appellant No. 1 – Shridhar. After necessary compliance, sale deed was to be executed on or before 15.01.2007, which was extended by agreement Exhibit 22.

4. Appellants contested the suit on the ground that appellant No. 2 – Kishanrao was not the signatory to the agreements and those would not bind him. It is contended that agreements are not enforceable. It is further pleaded that time was the essence of contract and suit was barred by limitation.

5. Respondent adduced evidence of three witnesses and the appellants adduced evidence of two witnesses. The Trial Court decreed the Spl. C. S. No. 61 of 2009 vide judgment dated 19.12.2013. Being aggrieved, appellant preferred R.C.A. No. 78 of 2017, which was dismissed vide judgment dated 16.01.2020.

6. Learned counsel for the appellants Mr. H. I. Pathan formulates his submissions on substantial questions of law incorporated as A to G in the memo of the second appeal. He submits that agreements in question are not enforceable as appellant No. 2 - Kishanrao did not sign. There was no consent on the part of the appellant No. 2 and the suit should have been dismissed. It is submitted that time was the essence of contract and respondent failed to perform his part of contract. Both the Courts below ought to have dismissed the suit. It is further submitted that respondent was not ready and willing to perform

his part of contract and the findings in that regard are perverse. It is submitted that after receiving notice dated 29.11.2007 Exhibit 23, respondent did not pay balance amount and no steps were taken within eight days for getting the sale deed executed.

7. Learned counsel Mr. H. I. Pathan adverted my attention to the depositions of P.W. Nos. 1, 2 and 3 on the point of readiness and willingness. It is vehemently submitted that the prices are escalating. Agreement was executed in 2006 for consideration of Rs. 29,60,000/-, out of that only Rs. 3,00,000/- was paid as an earnest amount. Today's market price is much more than what was fixed between the parties. Considering the hardship discretion should not have been exercised in favour of the respondents.

8. Per contra, learned counsel Mr. Milind M. Patil (Beedkar) for the respondent adverts my attention to the recitals of agreements Exhibit Nos. 21 and 22 to canvass that it was agreed between the parties that suit house was allotted to appellant No. 2, but name of the appellant No. 1 is appearing in the record of right and with that understanding the agreements were executed. It is submitted that considering the written statement at Exhibit 13 and the agreements, the appellants are estopped from contending that agreements are not enforceable for want of signature of the appellant No. 2. It is further submitted that cross examination of D.W. No. 1 – Kishanrao supports case of the plaintiff. It is submitted that time can be said to be essence of

contract vide agreement at Exhibit 21, but by subsequent agreement Exhibit 22, no time limit was prescribed for executing sale deed. It is submitted that both the Courts below have concurrently recorded finding of facts of readiness and willingness, which would not be interfered with. It is submitted that the escalating prices of the properties cannot be the defence to deny relief of specific performance of contract.

9. With the assistance of learned counsels, I have gone through the record and proceedings. I have also considered relevant depositions of the witnesses.

10. Having considered rival submissions of the parties, undisputedly, agreement at Exhibit 21 was executed on 09.11.2006 prescribing cut off date of 15.01.2007 for execution of sale deed. The Time was extended by further agreement dated 17.01.2007 Exhibit 22, which does not prescribe a cut off date, but only recites to execute sale deed within eight days from compliance made by the parties.

11. Considering the recitals of both the agreements and the depositions of the witnesses, appellants were obliged to clear the taxes, get corrected P.R. card and keep the relevant documents ready for the sale deed. It was their bounden duty to comply above formalities and intimate the respondent about the compliance so that he would pay the balance amount.

12. Appellant No. 2 – Kishanrao did not sign either of the agreements. His son Deepak was the attesting witness to both agreements Exhibit 21 and 22. The written statement filed by both the appellants at Exhibit 13, unequivocally shows that it was understanding between the parties that suit house was allotted to the appellant No. 2 – Kishanrao, but the record of rights was disclosing name of appellant No. 1 – Shridhar. There was no specific defence by the appellant No. 2 that behind his back the suit house was proposed to be sold by the appellant No. 1. The circumstances do not show that the appellant No. 2 was unaware of any transaction of selling the suit house. In all probabilities presuming that the appellants were co-owners, they were made defendants in the suit. It is impermissible for them to contend that agreements are not enforceable as against the appellant No. 2.

13. The above aspect is specifically dealt with by both the Courts below. After demise of appellant No. 1 his heirs filed written statement, but did not step into witness box. It is not permissible to contend that appellant No. 1 had no right to execute the sale deed. In this regard the admissions of the appellant No. 2 in the cross examination are very speaking and corroborates respondent's case. Both the Courts below have recorded concurrent findings of facts, which cannot be faulted.

14. To appreciate the submissions as to whether the time was essence of contract and whether the suit was barred by

limitation, I have carefully gone through the recitals of agreement Exhibit Nos. 21 and 22. By first agreement it was agreed that sale deed was to be executed by 15.01.2007 and failure of which would result in forfeiture of the earnest amount. By subsequent agreement Exhibit 22 the time was extended by eight days from the date of compliances made by the appellants. There is no default clause incorporated showing for forfeiture of earnest or repudiation of the contract. The Trial Court recorded that time was essence of contract mainly relying upon agreement Exhibit 21, which is rectified by the lower Appellate Court holding it in negative. A reliance is placed on the judgment of the Supreme Court in the matter of Arosan Enterprises Ltd. Vs. Union of India and another reported (1999) 9 SCC 449 which is squarely applicable to the facts of the case. In view of the agreement Exhibit 22, it is rightly concluded that time was not essence of contract. I do not find any illegality or perversity in the findings recorded by the Appellate Court.

15. The subsequent agreement was executed on 17.01.2007. There was exchange of notices between the parties. Thereafter suit was filed on 17.07.2009. It is filed within a period of three years from the cause of action. There is no substance in the submission that suit is barred by limitation.

16. I have carefully gone through the findings recorded by both the Courts on the point of readiness and willingness. I have already observed that it was the duty of the appellants to pay

taxes, to clear the dues, to rectify the record of rights and thereafter to apprise to the respondent. There is no evidence on record to show that after correcting the PR card any intimation was given to the respondent. It is admitted by the defendant No. 2 in his cross examination that no such intimation in writing was given to the plaintiff. It is difficult to believe that orally respondent was informed after 01.08.2007. On 29.11.2007 a notice was issued to the respondent, however, it is not made clear as to whether the respondent was apprised of the clearance of dues and payment of taxes at any point of time. The reply dated 26.12.2007 given by the respondent to the notice was not responded.

17. With the assistance of learned counsels I have gone through the cross examination of D.W. No. 2 – Kishanrao.

18. Parties have agreed for the consideration of Rs. 29,60,000/-. Out of that Rs. 3,00,000/- were paid as earnest amount by the respondent. The possession was to be handed over at the time of execution of the sale deed. Both Courts below have recorded that the respondent was ready and willing to perform his part of contract. The agreements are found to be enforceable. Under these circumstances merely because the consideration is inadequate or it's only place of residence would be against Sec. 20(2) of the Specific Relief Act. There is nothing on record to show that agreements were fraudulently executed and there was no intention to sell out the suit house. I do not find any substance in the submission of hardship pressed into service by

the appellants.

19. The learned counsel for the respondent has relied on the judgment of the Apex Court in the matter of Balasaheb Dayandeo Naik (Dead) through Lrs and others Vs. Appasaheb Dattatraya Pawar reported in *[2008] 1 S.C.R. 1169*. It is submitted that the recital in agreement Exhibit 21 regarding forfeiture of earnest amount on failure to comply with the agreement would not be interpreted as time was the essence of contract. I have gone through para No. 13 of the judgment, which can be reiterated as follows :

“13) It is true that the defendant in his written statement has made a bald claim that the time was the essence of contract. Even if we accept the recital in the agreement of sale (Exh. 18) that the sale deed has to be executed within a period of six months, there is an express provision in the agreement itself that failure to adhere the time, the earnest money will be forfeited. In such circumstances and in view of recital pertaining to forfeiture of the earnest money makes it clear that time was never intended by the parties to be of essence. The Constitution Bench decision in Chand Rani vs. Kamal Rani (supra) also makes it clear that mere fixation of time within which contract is to be performed does not make the stipulation as to the time as the essence of contract. Further, we have already pointed out that the defendant has not bothered to prove his claim on oath before the Court to the effect that it was the plaintiffs who avoided performing their part of contract. All the above-mentioned material aspects were correctly appreciated by the trial Court and unfortunately the High Court failed to adhere to the well known principles and the conduct of the defendant. When the third plaintiff deposed before the Court explaining their case with reference to the recitals in the agreement of sale including the reference to the legal notice to the defendant, in the absence of contra evidence on the side of the defendant, we are unable to agree with the conclusion arrived at by the High Court in non suiting the plaintiff. The High

Court commented the conduct of the plaintiffs in praying for refund of the earnest money, namely, Rs.20,000/- paid as advance. As rightly pointed out, the claim for refund of earnest money is only their alternative claim. It is not in dispute that in all suits for specific performance, the plaintiff is entitled to seek alternative relief in the event the decree for specific performance cannot be granted for any reason, hence there is no infirmity in the alternative plea of refund.”

Considering the above ratio even from the agreement Exhibit 21 it cannot be inferred that time was essence of contract, muchless the subsequent agreement does not provide the said clause.

20. For the foregoing reasons I find that the substantial questions of law which are pressed into service by the appellants are ostensible only and without any merit. Second appeal stands dismissed. There shall be no order as to costs.

[SHAILESH P. BRAHME J.]

bsb/Sept. 25