



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

Second Appeal No. 229 Of 2025
With
Civil Application No. 6236 Of 2025

Sitaram Tukaram Wagh,
Age : 72 years, Occupation-Retired,
R/o- Plot Not. 38, Shivshakti Chowk,
Mogalnagar, Trimurti Chowk,
CIDCO, Nashik.

.. Appellant

Versus

Nanasaheb Radhar More
Age : 64 years, Occupation-Retired,
R/o- C.T.S. No.4697, Rajkamal,
Backside of Manohar Cinema,
Ambedkar Chowk, Dhule.

.. Respondent

* Advocate for the Appellant :
Mr. Shivaji T. Shelke

* Advocate for the Respondent :
Mr. Joslyn Menzes

CORAM : SHAILESH P. BRAHME, J.
DATE : 23rd JUNE 2025

FINAL ORDER :

1. Heard both sides.
2. Appellant who is original Defendant, is aggrieved by judgment and decree passed by trial Court in Special Civil Suit No.48/2021 for the relief of specific performance of contract and delivery of possession which is confirmed by Lower Appellate Court vide judgment and decree dated 10.01.2025 in Regular Civil Appeal No.111/2023.

3. Respondent is the owner of land Survey No.87/2 and proposed to sell out Plot No.19 measuring 429 sq. mtrs. to the Appellant by executing agreement to sale on 18.01.2021 at Exhibit – 38. The consideration was fixed at Rs.57,00,000/-. By condition no.5 of the agreement, parties had agreed to execute sale deed within period of three months. It was further stipulated that failure of execution of the sale deed would give rise to cancellation of the transaction. The Appellant had paid Rs.10,00,000/- as earnest. There was no progress. Hence notice was issued by the Appellant on 20.04.2021, calling upon the Respondent to perform his part of contract by extending time for seven days. It was replied by the Respondent on 23.04.2021, challenging the contents of the notice. On 04.05.2021, further notice was issued by Appellant, calling upon the Respondent to complete transaction within further seven days.

4. As there was non-compliance on part of the Appellant, suit was filed by the Respondent. It is contested by Appellant on the ground that time was essence of the contract. Respondent failed to perform his part of contract within three months as well as within the extended period. It is contended that in view of terms of contract, agreement was rescinded by the Appellant and agreement was not enforceable. It is further contended that Respondent was never ready and willing to perform his part of contract and unable to pay balance amount.

5. Respondent – Plaintiff examined two witnesses including himself.

Appellant did not enter the witness box, but adduced evidence of Dr. Gulab Wagh as his witness.

6. Learned Counsel Mr. Shelke would refer to substantial questions of law stated in memo from ground nos. I to XI. During the course of argument, new substantial questions of law in form of ground no. XI is pressed into service pertaining to the enforceability of the agreement without claiming any relief of declaration in the suit. Learned Counsel would submit that as per Clause 5, time was the essence of contract and the Respondent failed to pay the balance amount. Despite receiving the notices dated 20.04.2021 and 04.05.2021, no steps were taken and ultimately his client rescinded the contract. Hence both the Courts below committed illegality in decreeing the suit. It is further submitted that Respondent is not ready and willing to perform on part of his contract. Despite extending the time, no payment was made. There is no evidence on record to show that the balance amount was ready with the Appellant and no endeavour was made for execution of the sale deed.

7. Learned Counsel would vehemently submit that both the Courts below have drawn wrong inference of the interaction between Respondent and Dr. Gulab Wagh in respect of demand of Rs.30,00,000/-. It was as per agreement between the parties. It is further submitted that once contract was terminated, unless relief of declaration was solicited, no relief of specific performance of contract could have been granted.

8. Per contra, learned Counsel Mr. Joslyn Menzes would support the judgments and decree passed by both the Courts below. He would submit that Appellant did not enter into witness box and offer himself for the cross-examination and therefore adverse inference should have been drawn against him. It is submitted that his client was ready and willing to perform his part which is evident from notice reply Exhibit-44, sanction of loan in the name of his Sons. It is further contended that it was never agreed between the parties that sale deed was to be executed for Rs.17,00,000/- only to avoid the stamp duty and therefore demand of Rs.30,00,000/- was contrary to the contract. It is submitted that as the transaction pertains to immovable property and time for execution of sale deed was extended, time cannot be essence of contract. Lastly it is contended that suit was filed on 07.05.2021, when there was no termination of agreement. Hence there was no necessity to claim declaration.

9. Having heard both the sides, I find that parties are not disputing the terms of agreement Exhibit-38. Appellant did not enter the witness box and only examined Dr. Gulab Wagh as his witness. The said witness pertains to the interaction with the Respondent, demanding Rs.30,00,000/-. His evidence would not help the Appellant to make out case of his readiness and willingness. His evidence is silent regarding termination of agreement. Appellant failed to enter the witness box and offered himself for cross-examination. That results in drawing adverse inference against the Appellant. A useful reference can be made to law laid down by the Supreme Court in the matter

of **Vidyadhar Vs. Manikrao and Anr.**, (1999) 3 SCC 573.

10. I have gone through the contents of agreement at Exhibit-38, especially Condition No.5, notices exchanged between the parties and their pleadings. The time for execution of sale deed was agreed to be of three months and it was to expire on 18.04.2021. A notice dated 20.04.2021 issued by the Appellant which is at Exhibit-43 shows that time for execution of sale deed was extended by seven days. Thereafter the last notice dated 04.05.2021 at Exhibit-45 extended the time for further seven days. Thus the Appellant went on extending time for execution of sale deed instead of terminating the agreement forthwith. This conduct shows that there was no intention to rescind the contract. Hence I do not find substance in the theory of the Appellant that time was the essence of contract. The relevant term no.5 only had given right to the Appellant to resort to termination of the contract. But the termination was not ipso-facto and ipso-dixit. The submission and the substantial questions of law posed in this regard by the Appellant cannot be countenanced.

11. It was not the contract between the parties that the consideration was to be shown of Rs.17,00,000/- to avoid stamp duty. Neither was there any material on record to indicate that such was the understanding or deliberation after executing agreement. The demand of Rs.30,00,000/- at the instance of Dr. Gulab Wagh (DW-1) is definitely besides the terms of Exhibit-38. The cross-examination of DW-1 and the explanation for demanding Rs.30,00,000/- would be of

no assistance to the Appellant. Both the Courts below have rightly appreciated oral evidence of the Respondent to infer that there was breach of agreement.

12. Respondent has adduced his oral evidence and relied on notice reply dated 23.04.2021 to make out his case of readiness and willingness to perform contract. Besides that it is rightly referred by Lower Appellate Court that in February, 2021, a loan of Rs.18,10,017/-; Rs.17,93,721/- and Rs.26,00,000/- were sanctioned in the name of Sons of the Respondent. As against that, there is absolutely no oral evidence on part of the Appellant. The inference drawn by both the Courts below for readiness and willingness in favour of the Respondent cannot be faulted.

13. Learned Counsel for the Appellant adverted my attention to the relief sought in the suit. It is contended that Appellant terminated the agreement and unless a declaration in respect of termination is solicited, simplicity suit for specific performance of contract is not maintainable. Appellant did not enter into witness box. His witness DW-1 - Dr. Wagh did not depose in respect of termination of the agreement. The written statement is also silent regarding plea of termination of the agreement. Interestingly in both the notices issued by the Appellant at Exhibits-43 and 45, it was expressly stated that the agreement was terminated. When the suit was filed on 17.04.2021, there was no termination of the agreement. Even if it is presumed that vide first notice at Exhibit-43 issued on 20.04.2021,

the agreement is said to have been terminated, by that time the suit was filed. In other words, when the suit was filed, agreement was subsisting. Under these circumstances, it was not necessary for the Respondent to seek relief of declaration. The plea is afterthought and devoid of any foundation in the pleadings and material on record.

14. Learned Counsel for the Appellant Mr. Shelke has relied upon the judgment of **His Holiness Acharya Swami Ganesh Dassji Vs. Sita Ram Thapar**, (1996) 4 SCC 526. In that case, Hon'ble Apex Court explained the terms readiness to perform the contract and willingness to perform the contract. The proposition cannot be disputed. The next judgment in the matter of **Boodireddy Chandraiah and Ors. Vs. Arigela Laxmi and Anr.**, AIR 2008 SC 380. I have gone through the paragraph nos. 11 to 13 of the judgment. Relying on this proposition, I find that in the present matter, no substantial questions of law is involved.

15. Lastly judgment in the matter of **I.S. Sikandar Vs. K. Subramani and Ors.**, (2013) 15 SCC 27, is relied upon to buttress the submissions that unless there is a prayer for declaration that termination of agreement is bad in law, suit for specific performance is not maintainable. In that case, first Respondent had instituted suit for specific performance of contract on the basis of agreement of sale dated 25.12.1983. It was agreed that sale deed was to be executed within five months. The Defendant in that suit had issued legal notice, calling upon the Respondent No.1 – Plaintiff to pay balance amount.

As the Plaintiff was non-responsive by letter dated 23.03.1985 agreement was rescinded. The Defendant later on alienated the property to the Appellant by deed of conveyance. A plea was raised in defense that suit for specific performance was not maintainable.

16. Suit was decreed partly by the trial Court, denying substantive relief. The Plaintiff – Respondent was required to file First Appeal before the High Court. High Court allowed First Appeal granting decree for specific performance of contract. Being aggrieved, appeal was preferred before the Supreme Court. Under peculiar circumstances of that case, it was held that suit for specific performance of contract was not maintainable without claiming the relief of declaration in respect of termination of the agreement of sale. The Plaintiff by reply, had admitted his default and prayed for extension of time. As the Plaintiff failed to comply his part of contract during extended period vide notice dated 28.03.1985, the agreement was terminated. Thereafter suit was filed on 26.06.1985. In that context, the observations are made by the Apex Court in paragraph nos. 34 to 38.

17. In the case at hand, the agreement was not terminated by the Appellant by notice dated 20.04.2021 or notice dated 04.05.2021. But time was extended for compliance. Pertinently when suit was filed on 17.04.2021, there was no termination of the agreement. Therefore, the ratio of the Supreme Court cannot be made applicable to the facts of the present case.

18. The above judgment of Supreme Court is sought to be relied by the Appellant for the proposition stated in paragraph nos. 39, 40 and 52 of the judgment to buttress that time of 3 months was the essence of contract between the parties. However, I have already recorded that the time was extended by Appellant on couple of occasion. Considering the conduct, it cannot be inferred that time was the essence of contract. Therefore, no benefit of the judgment can be given to the Appellant.

19. There are concurrent findings of facts. The substantial questions of law proposed by the Appellant have no substance. The marginal errors committed by the trial Court in paragraph nos. 23 and 24 regarding date as 19.04.2021 instead of 17.04.2021 would be hyper technical and cannot constitute any substantial questions of law. All aspects of the matter have been dealt with. It is relevant to note that the balance amount of consideration has been deposited by the Respondent in the Court. I, therefore pass following order :

ORDER

1. Second Appeal is dismissed.
2. Reasons to follow.
3. After pronouncement of the operative part of the order, learned counsel for the appellant prays stay to the operation and execution of decree passed by the trial court.

4. It is contended that there was such a stay when matter was before the lower appellate court. Learned counsel Mr.Menzes for the respondent opposes the request and submission. It is contended that the respondent deposited balance amount as per the decree passed by the trial court. Respondent is waiting for possession and execution of sale deed since long.

5. There was interim stay when matter was before lower appellate court. Interest of justice would be subserved by granting stay to operation and execution of judgment and decree of the trial court for further period six (06) weeks from today.

6. After expiration of the said period, stay granted shall automatically stand vacated without reference to the Court.

**SHAILESH P. BRAHME
JUDGE**

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