

CASE NO.:
Appeal (civil) 647 of 2008

PETITIONER:
Balasaheb Dayandeo Naik (Dead)through LRs & Ors

RESPONDENT:
Appasaheb Dattatraya Pawar

DATE OF JUDGMENT: 24/01/2008

BENCH:
Dr. Arijit Pasayat & P. Sathasivam

JUDGMENT:
JUDGMENT
(Arising out of SLP (C) No. 16694 OF 2005)
P. Sathasivam, J.

1) Leave granted.

2) This appeal is directed against the judgment and order dated 11.01.2005 passed by the High Court of Judicature at Bombay in First Appeal No. 743 of 1993 in and by which the High Court set aside the decree for specific performance granted by the trial Court and consequently dismissed the suit of the plaintiffs.

3) Brief facts in a nutshell are:
The appellants/plaintiffs in special civil suit No. 320 of 1988 filed the same for specific performance of agreement dated 31.07.1985. According to the plaintiffs, the respondent herein/defendant is the owner of land Block No. 208 and Block No. 209 respectively admeasuring Area H. 0.60 R and H. 0.40 R of Village Nagaon in Hatkanangale Tahsil. The defendant had entered into an agreement for sale of the said lands to the plaintiffs for a consideration of Rs.85,000/- per acre. The agreement was reduced into writing and according to the terms of the agreement, the sale deed was to be executed by the defendant within a period of six months. It was agreed that possession of the lands was to be delivered at the time of execution of sale deed. The defendant has also undertaken the responsibility of obtaining necessary permission for sale of the lands, if required. On the date of execution of the agreement, an amount of Rs.20,000/- was paid by the plaintiffs to the defendant as earnest money and balance amount of the consideration was to be paid at the time of execution of the sale deed. The plaintiffs were always ready and willing to perform their part of the contract but the defendant avoided to receive the balance amount of consideration and neglected to execute the sale deed. The plaintiffs sent a legal notice on 16.07.1988 to the defendant through their advocate calling upon him to perform his part of the obligation under the contract. In spite of the notice, the defendant did not comply with the requirements which necessitated the plaintiffs to file the suit for specific performance or in the alternative refund of earnest money with interest thereon @ 15% per annum.

4) The defendant filed a written statement wherein he denied the plaintiffs claim. It was further stated that though agreement for sale of the suit lands was entered into between him and the plaintiffs on 31.07.1985, the sale deed was to be executed within a period of six months from the date of contract as he was in dire need of money for construction of

his house and, therefore, the time was the essence of the contract. He had called upon the plaintiffs to pay the balance amount of consideration and get the sale deed executed. But the plaintiffs were not in a position to arrange the balance amount of consideration and complete the contract. As the market price of the agricultural lands have now gone up, the plaintiffs by purchasing the suit lands are intending to dispose of the same to others at a higher price. In view of the same, the plaintiffs are not entitled to discretionary relief of specific performance of contract.

5) The learned Civil Judge (Senior Division), on 23.02.1993, after finding that the defendant has failed to prove that time was the essence of contract and the plaintiffs were and are ready and willing to perform their part of contract decreed the suit as prayed for. Aggrieved by the aforesaid judgment of the trial Court, the defendant filed First Appeal No. 743 of 1993 before the High Court of Judicature at Bombay. The learned Single Judge of the High Court not in agreement with the conclusion of the trial Court and finding that plaintiffs failed to substantiate their plea allowed the appeal of the defendant and dismissed the suit. Questioning the judgment and order of the High Court, the plaintiffs have filed the present appeal by way of special leave. During the pendency of the appeal before this Court, Balasaheb Dayandeo Naik/first plaintiff died and his legal representatives were brought on record as per order dated 19.09.2006 in I.A. No. 3 of 2005.

6) We heard Mr. Makarand D. Adkar, learned counsel appearing for the appellants and Mr. V.N. Ganpule, learned senior counsel appearing for the respondent, perused the entire annexures and other relevant materials filed before this Court.

7) Having regard to the terms of agreement of sale dated 31.07.1985, reasonings of the trial Court as well as the High Court and submissions before this Court, only two points arise for consideration of this Court, namely, (a) whether time is the essence of the contract? and (b) whether the plaintiffs were ready and willing to perform the contract?

8) In order to find an answer to the above questions, it would be useful to refer the relevant recitals from the agreement of sale. Para 3 of the agreement specifically mentions the details of the land sought to be sold such as extent and boundaries. It also refers the easement rights and the period in which the sale has to be completed. The recital reads as under:-

\023From the total consideration I have received Rs.20,000/- as an earnest money of which no independent receipt is necessary. Rest of the amount is to be paid by you at the time of sale deed of the said lands. It is agreed between the parties that the sale deed is to be executed within 6 months from today. Possession of the land is to be handed over at the time of sale deed.\024

It is also relevant to mention the default clause which reads as under:-

\023For completion of the sale deed the permission is required to be obtained by me. If I fail to execute the said deed within stipulated period then you have to get it executed on the basis of this agreement. On the contrary if you fail to get execute the sale deed then this agreement is supposed to be cancelled and the earnest amount will be forfeited. The land is free from all sorts of encumbrances. This agreement is

binding on myself and my legal heirs etc. dated 31/7/1985.\024

The above-mentioned details in the agreement of sale clearly show a) that the subject-matter of the property is an agricultural land/immoveable properties b) the sale deed is to be executed within six months from the date of sale agreement i.e. 31.07.1985. c) possession of the land to be handed over at the time of execution of sale deed d) failure to get execute the sale deed, the earnest money will be forfeited. With these factual details, let us consider the legal principles enunciated by this Court.

9) In Chand Rani (Smt.) (dead) by LRs. Vs. Kamal Rani (Smt.) (dead) by LRs, (1993) 1 SCC 519, a Constitution Bench of this Court has held that in the sale of immoveable property, time is not the essence of the contract. It is worthwhile to refer the following conclusion:
\02319. 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.\024

\02321. In Govind Prasad Chaturvedi v. Hari Dutt Shastri (1977) 2 SCC 539 following the above ruling it was held at pages 543-544: (SCC para 5)

\023... It is settled law that the 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. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. [Vide Gomathinayagam Pillai v. Pallaniswami Nadar 1 (at p. 233).] It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are 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.\024

\02323. In Indira Kaur (Smt) v. Sheo Lal Kapoor (1988) 2 SCC 488 in paragraph 6 it was held as under:

\023... The law is well-settled that in transactions of sale of immovable properties, time is not the essence of the contract.\024

10) It is clear that in the case of sale of immoveable property, there is no presumption as to time being the essence of the contract. Even where the parties have expressly provided that time is the essence of the contract, such a stipulation will have to be read along with other provisions of the contract. For instance, if the contract was to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week, the work undertaken remains unfinished on the expiry of the time provided in the contract, such clauses would be construed as rendering ineffective the express provision relating to the time being of

the essence of contract. In the case on hand, though the parties agreed that the sale deed is to be executed within six months, in the last paragraph they made it clear that in the event of failure to execute the sale deed, the earnest money will be forfeited. In such circumstances, the above-mentioned clauses in the last three paragraphs of the agreement of sale would render ineffective the specific provision relating to the time being the essence of contract.

11) This Court in Swarnam Ramachandran (Smt.) and Another vs. Aravacode Chakungal Jayapalan, (2004) 8 SCC 689 has once again reiterated that time is not the essence of contract relating to immoveable property. The following statement of law in para 12 are rightly applicable to the case on hand:

\02312. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract.\024

12) As observed in the said decision, in the case on hand the appellants/plaintiffs clearly established their claim to secure specific performance of the agreement by leading cogent evidence whereas the respondent/defendant having pleaded that time was the essence of the contract neither entered the witness box nor led any evidence whatsoever. The High Court lost sight of the above material aspect and the conduct of the defendant in not strengthening his plea by placing acceptable evidence. In such circumstances, as rightly argued by learned counsel for the appellants, the High Court should have confirmed the decree of specific performance granted by the trial Court. On the other hand, the High Court wrongly placed reliance on the decision of this Court in K.S. Vidyanadam and Others vs. Vairavan, (1997) 3 SCC 1 as in the facts of that case, this Court found that granting for specific performance was inequitable, however such aspect of the matter was totally absent in the case on hand. Even otherwise, para 11 of the judgment shows that the subject matter of the property was an urban immoveable property and in such special circumstance relaxed the general rule that time is not the essence of the contract in the case of immoveable properties. In the case on hand, the details furnished in the agreement clearly show that the subject-matter of the property is an agricultural land situated in Kolhapur Dist., Maharashtra. In such circumstances, the decision in K.S. Vidyanadam and Ors. (supra) is not applicable to the facts on hand. In the facts of the present case, which we have already adverted to, neither the terms of agreement nor the intention of the parties indicate that the time is an essence of the agreement. We have already pointed that having raised such a plea the respondent even did not bother to lead any evidence.

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.

14) In the light of what has been stated above, we set aside the judgment and decree of the High Court and confirm the decree granted by the trial Court. In view of the said conclusion, the appellants/plaintiffs are directed to deposit the balance amount of sale consideration i.e., Rs.1,92,500/- in the trial Court within a period of eight weeks whereupon the respondent/defendant shall execute the sale deed of the suit lands Block No. 208 admeasuring 0.60 R and Block No. 209 admeasuring 0.40 R of Village Nagaon, Tahsil Hatkanangale as per the agreement dated 31.07.1985. In case of failure of the defendant to execute the sale deed, the plaintiffs shall be entitled to get the sale deed executed through Court.

15) The civil appeal is allowed on the above terms. However, in the facts and circumstances of the case, there shall be no order as to costs.