

(2015) 02 BOM CK 0151**Bombay High Court (Nagpur Bench)****Case No:** Second Appeal No. 35 of 2011

Manohar and Others

APPELLANT

Vs

Goma and Others

RESPONDENT

Date of Decision: Feb. 10, 2015**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Contract Act, 1872 - Section 46
- Specific Relief Act, 1963 - Section 16(c)

Citation: (2015) 4 MhLj 643**Hon'ble Judges:** A.S. Chandurkar, J.**Bench:** Single Bench**Advocate:** N.S. Deshpande, for the Appellant**Final Decision:** Allowed

Judgement

A.S. Chandurkar, J.

This appeal filed under Section 100 of the Code of Civil Procedure challenges the judgment passed by the first appellate Court dated 16-9-2010 reversing the judgment passed by the trial Court. Thereby the dismissal of suit for specific performance has been set aside and decree for specific performance of agreement dated 21-4-1988 has been passed.

2. The original defendant was the owner of field Survey No. 353 situated at mouza Wadag, District Wardha. On 21-4-1988, he entered into an agreement to sell 3 Hectares 24 R land to the original plaintiff - Goma for a consideration of Rs.31,200/-. Earnest amount paid was Rs.16,000/- and balance consideration of Rs.15,200/- was to be paid by 21-4-1989. It was agreed that permission of the Collector would be obtained by the defendant within said period and if permission was not received by said period, then within one month from receiving such permission, the sale deed would be executed. The possession of the suit field came to be delivered to said Goma on the same day.

3. On 20-11-2000, notice came to be issued by said Goma to the original defendant in which it was stated that he was ready and willing to have the sale deed executed in his favour and hence, the defendant was called upon to execute the sale deed as it was learnt that necessary permission had been obtained. This notice was followed by another notice dated 17-3-2001 again issued to the defendant. As the sale deed was not executed, on 13-6-2001 suit for specific performance of agreement dated 21-4-1988 came to be filed.

4. The original defendant filed his written statement vide Exhibit-13 and raised a plea that the suit was barred by limitation. It was also pleaded that the possession was never handed over to the plaintiff and that the plaintiff was not ready and willing to perform his part of the agreement.

Along with the written statement a counter claim was also filed seeking possession of the suit field as according to the original defendant, the plaintiff had taken forcible possession of the suit property.

The original plaintiff opposed aforesaid counter claim by filing his written statement at Exhibit-26.

5. The trial Court after considering the evidence on record held that the suit as filed was barred by limitation and that the plaintiff had failed to prove that he was ready and willing to perform his part of the agreement. The suit, therefore, came to be dismissed. The counter claim came to be allowed and the plaintiff was directed to hand over possession of the suit field to the defendant.

6. The first appellate Court reversed aforesaid decree by holding that the suit was filed within limitation and the plaintiff was always ready and willing to perform his part of agreement. It further held that as the plaintiff had issued notices to the defendant, he was entitled for decree for specific performance. Hence, the appeal came to be allowed and the decree for specific performance came to be passed. The said decree was, however, subject to permission being granted by the competent authority.

7. The following substantial questions of law were formulated when the second appeal was admitted.

(i) Whether the original plaintiff established his readiness and willingness to take up the sale-deed as required by Section 16(c) of the Specific Relief Act and whether the finding recorded by the lower appellate Court that the plaintiff was ready and willing is perverse?

(ii) Whether the suit was clearly barred by limitation provided under Article 54 of the Limitation Act, 1963 in the light of the fact that no steps were taken by the original plaintiff right from 1989 till filing of the suit particularly when the date for performance was fixed in the agreement?

8. Shri N.S. Deshpande, learned Counsel appearing for the appellants - legal heirs of the original defendant submitted that the first appellate Court erred in reversing the decree passed by the trial Court. He submitted that the suit as filed was barred by limitation inasmuch as the sale deed was to be executed by 21-4-1989 and for a period of more than 10 years, the plaintiff had not taken any steps to enforce the agreement. He submitted that in terms of Article 54 of the Limitation Act, 1963, the suit was filed beyond the period of limitation. He further submitted that the plaintiff had failed to prove that he was ready and willing to perform his part of the agreement. There being total inaction on the part of the plaintiff for more than 10 years, it was clear that readiness and willingness of the plaintiff had not been duly proved. He submitted that even the notice that was issued on 20-11-2000 was on account of his alleged possession being disturbed. In support of aforesaid submissions, the learned Counsel placed reliance on the following judgments.

[1] [R.K. Parvatharaj Gupta Vs. K.C. Jayadeva Reddy, .](#)

[2] [Gunwantbhai Mulchand Shah and Others Vs. Anton Elis Farel and Others, .](#)

[3] [Panchanan Dhara and Others Vs. Monmatha Nath Maity \(Dead\) thr. L.Rs. and Another, .](#)

[4] [Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others, .](#)

[5] [Nakubai Valu Dhokane since deceased through heirs and LR"s Shakuntalabai Pandurang Jagtap and Others Vs. Bhagwansingh Prakash Chandra, .](#)

[6] Ahmadsahab Abdul Mulla (2) (dead) by proposed Lrs. vs. Bibijan and others, 2009(5) Mh.L.J. 117.

He, therefore, submitted that the decree passed by the first appellate Court deserves to be set aside.

9. Shri S.D. Zoting the learned Counsel for the respondent initially submitted that he had no instructions from the respondent Nos. 2,3 and 5. However, as the appeal was part heard, he has not been discharged and the learned Counsel has thereafter addressed the Court on merits. The learned Counsel appearing for the respondent Nos. 2,3 and 5 supported the impugned judgment. He submitted that in terms of agreement dated 21-4-1988, it was incumbent upon the defendant to have obtained necessary permission for executing the sale deed in favour of the plaintiff. As the defendant failed to obtain necessary permission, it could not be said that there was any lapse on the part of the plaintiff in not approaching the Court earlier. He submitted that as possession of the suit field had been handed over to the plaintiff, he continued to utilize the same and when he learnt that such permission was obtained, notice came to be issued on 20-11-2000. He further submitted that the plaintiff was always ready and willing to perform his part of the

agreement and this fact was further clear from the deposition of the defendant wherein he stated in his cross examination that the plaintiff was ready to pay the balance consideration even on said date. He also submitted that as no time had been fixed for executing the sale deed, it could not be said that the suit was barred by limitation. He, therefore, submitted that the first appellate Court rightly reversed the decree passed by the trial Court. He, therefore, sought dismissal of the second appeal.

10. The agreement dated 21-4-1998 (Exhibit-67) is not in dispute. The defendant had admitted execution of aforesaid agreement and payment of earnest amount of Rs.16,000/-. In said agreement, the period for executing the sale deed is mentioned as 21-4-1989. It is further stated that by said period, the defendant would obtain permission from the Collector and execute the sale deed. It is further stated that if permission was not obtained within said period, then whenever permission is received, sale deed would be executed within a period of one month. The original plaintiff - Goma expired during pendency of the civil suit and hence, his widow was examined as PW1 (Exhibit-49). In her cross examination she, however, stated that she was not aware of the actual transaction as she was not present at that point of time. She was further not aware of the amount of earnest money paid to the defendant. PW2 Rajendra Kodape (Exhibit-64) was residing in the same village and having his field therein was also examined on the aspect of possession of the plaintiff. Thereafter one Manohar Wadodkar (Exhibit-66) has been examined. This witness stated that he was present when the agreement took place. He also stated that possession was with the plaintiff.

11. The defendant examined himself (Exhibit-72). In his cross examination, he admitted that possession was with the plaintiff since the date of agreement. His further statement that "it is true to say that the plaintiff even today is ready to pay the balance amount and get the sale deed executed". The defendant also examined one Vikas Bobde (Exhibit-79) and one Sushil Mohata (Exhibit-80) in support of his defence.

12. The trial Court held that since the plaintiff had filed the suit after 12 years from the agreement, the same was barred by limitation. It also held that the evidence on record was not sufficient to show the readiness and willingness of the plaintiff. These findings have been reversed by the first appellate Court mainly on the ground that the defendant had stated in his cross examination that the plaintiff was ready to execute the sale deed even when said deposition was recorded. It further held that while the defendant did not take any steps to obtain permission, the plaintiff was ready and willing to perform his part of the agreement.

13. It is necessary to consider the agreement at Exhibit-67. As per said agreement, it was for the defendant to have obtained necessary permission by 21-4-1989 and thereafter if same was not obtained, then the sale deed was to be executed within one month of such permission being specifically obtained. It is, therefore, necessary to consider the stand of the parties in that regard. As noted above, the plaintiff could not be examined as he expired during pendency of the trial. It is evident from the material on record that prior to

21-4-1989 or even thereafter till 20-11-2000 there has been no communication from either of the parties in the matter of getting the sale deed executed. The first notice that has been issued by the plaintiff is dated 20-11-2000 which is at Exhibit-50. The plaintiff being in possession of the suit field, it was incumbent upon him to have made some enquiries as regards obtaining necessary permission to have the sale deed executed. Even if it is assumed that the defendant did not take any steps to obtain necessary permission as per agreement at Exhibit-67, the period of more than 11 years of inaction is too long a period for a person to wait for having the sale deed executed. The suit as filed is on 13-6-2001 which is more than 12 years from the date on which the sale deed was agreed to be executed. Even assuming that till 21-4-1989 the sale deed was not got executed by the defendant, nothing prevented the plaintiff from expressing his willingness to take necessary steps to have the sale deed executed from the defendant. There is no evidence whatsoever from the side of the plaintiff to indicate that some steps were taken to either inquire or thereafter to ensure that permission was obtained from the competent authority to have the sale deed executed. The decisions in R.K. Parvatharaj, Gunwantbhai, Panchanan Dhara, Seema Arshad and Nakubai (supra) support the case of the appellants.

14. The provisions of Section 16(c) of the Specific Relief Act require the plaintiff to aver and prove that he was always ready and willing to perform his part of the contract. In the present case, there is no evidence whatsoever led from the side of the plaintiff to indicate readiness and willingness in terms of Section 16(c) of the Specific Relief Act. A stray statement of the defendant that the plaintiff was ready to pay the balance consideration by itself would not be sufficient to overcome inaction for a period of more than 11 years especially when the suit came to be filed on 13-6-2001. This readiness and willingness will also have to be adjudged in the context of the agreement between the parties. Even if the defendant was required to obtain necessary permission, the plaintiff could not have remained content without making any enquiries whatsoever even if he was in possession. Hence, substantial question of law no.1 is answered in the negative and the finding recorded by the lower appellate Court in that regard is perverse.

15. Considering the second substantial question of law, it is to be noted that the agreement at Exhibit-67 fixes the period for execution of sale deed by 21-4-1989. Though it was necessary for the defendant to obtain permission from the competent authority before executing the sale deed, the intention of the parties to make time the essence of the agreement is evident as period of one year was agreed for executing the sale deed. This period as prescribed cannot be ignored while considering the question whether the suit was filed within the period of limitation. It is true that the agreement further stipulates that if permission is not obtained within period of one year, then the sale deed would be executed within a period of one month from obtaining such permission. In a sense, it can be said that the subsequent stipulation in the agreement does not prescribe the outer limit for obtaining such permission. Hence, in such circumstances the permission was required to be obtained within reasonable time. Reference in that regard can be made to Section

46 of the Indian Contract Act, 1872. Section 46 reads as under:

"46. Time for performance of promise, where no application is to be made and no time is specified - Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time."

Explanation:-- The question "what is a reasonable time" is, in each particular case, a question of fact.

Hence, what is reasonable time would have to be considered in the facts of the present case. The initial stipulation as fixed was period of one year. There is no evidence from the plaintiff's side of having made any enquiry whatsoever from the defendant after 21-4-1989. The additional payment of Rs.2000/- by the plaintiff to the defendant has not been proved. Even if reasonable time in the present facts is taken to be three years from 21-4-1989, the suit has been filed on 13-6-2001. Period of three years after 21-4-1989 is a reasonably long period for the plaintiff to await for any response from the defendant in the context of agreement dated 21-4-1988. Thus, reasonable period of three years from 21-4-1989 can be assumed in the present case after which it can be said that the defendant was not interested in performing his part of the agreement resulting in there being refusal to perform his part of the agreement. Thus, even if it is assumed that after reasonable period of three years from 21-4-1989 which is 21-4-1992 there was refusal on the part of the defendant, in terms of Article 54 of the Limitation Act, 1963 the suit could have been filed within three years, that is till 20-4-1995. The suit has however been filed on 13-6-2001. Hence, even after giving the plaintiff a reasonable period of three years, the suit has been filed after almost six years. The substantial question of law no.2 is answered by holding that the suit as filed was barred by limitation under Article 54 of the Limitation Act, 1963.

16. Therefore, in the aforesaid facts, it will have to be held that the first appellate Court erred in reversing the decree passed by the trial Court by holding that the plaintiff was always ready and willing to perform his part of the contract. The reasons as assigned by the first appellate Court are not sufficient for the purposes of reversing the finding recorded by the trial Court in that regard.

17. In view of aforesaid, the following order is passed:

(a) The judgment dated 16-9-2010 passed in Regular Civil Appeal No. 70 of 2006 is set aside.

(b) The judgment passed by the trial Court in Regular Civil Suit No. 22 of 2001 stands restored. Decree is passed in said terms.

(c) The second appeal is allowed with no order as to costs.