

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 401 OF 2022

Amit Vijay Bhatewara ...Appellant

Versus
Avinash Vinayak Patwardhan & Anr. ...Respondents

WITH

INTERIM APPLICATION NO. 3044 OF 2022

IN

SECOND APPEAL NO. 401 OF 2022

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KULKARNI

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Mr. Kaustubh Thipsay a/w Ms. Ketki Gadkari, for the
Appellant.

Ms. Shirin Merchant a/w Farinaz Pathan, for the Respondents.

CORAM: N. J. JAMADAR, J.
Reserved On: 21st JANUARY, 2026
Pronounced On: 28th JANUARY, 2026

JUDGMENT:-

1. Heard the learned Counsel for the parties.
2. This second appeal is directed against a judgment and decree dated 31st March, 2022 passed by the learned District Judge, in Regular Civil Appeal No.104 of 2019, whereby the appeal preferred by the appellant – plaintiff against a judgment and decree in Special Civil Suit No.835 of 2010, dismissing the suit for specific performance, came to be dismissed by affirming the decree passed by the trial Court.

3. Shorn of superfluities the background facts can be stated as under:

3.1 The defendants - respondents are the owners of Flat No.2 alongwith a parking lot in Tridal Co-operative Society Ltd., Prabhat Road, Pune, ("the suit flat"). The defendants entered into a registered agreement to sell the suit flat for a consideration of Rs.50,00,000/-. A sum of Rs.1,00,000/- was accepted thereunder as part consideration. The balance amount was agreed to be paid at the time of execution of conveyance. The possession of the suit flat was also agreed to be delivered upon payment of balance consideration and execution of conveyance. The parties agreed, *inter alia*, that the defendants - transferors shall obtain the consent of Tridal Society (D2) for the transfer of the suit flat before execution of the sale deed.

3.2 Defendant No.1 applied to the Society (D2) for grant of consent for transfer. The Society did not give the consent. Proceedings were initiated before the Deputy Registrar, Co-operative Societies, for obtaining the consent of the Society for the said transfer. In the meanwhile, the plaintiff paid a sum of Rs.30,00,000/-, towards further consideration to the defendants and the defendants executed a registered deed of receipt and confirmation acknowledging the receipt of the sum of

Rs.30,00,000/- on 30th August, 2007. Eventually, as the defendants could not obtain the consent for transfer, on 19th September, 2007, a supplementary agreement came to be executed and registered, under which the defendants refunded the amount of Rs.30,00,000/-. It was agreed that the plaintiff shall pay the balance consideration of Rs.49,00,000/- upon obtaining the consent of the Society for the said transfer, and at that time possession of the subject flat would be delivered.

3.3 It appears despite diligent efforts and proceedings before the Deputy Registrar, Co-operative Societies, consent for transfer could not be obtained. The defendants, thus, addressed a communication to the plaintiff on 18th April, 2008 seeking to cancel the agreement for sale and return the amount of Rs.1,00,000/- to the plaintiff. This was followed by a further communication dated 27th April, 2008, whereby the defendants professed to cancel the agreement for sale and the supplementary agreements, and offered to return the amount of Rs.1,00,000/-. The plaintiff addressed a legal notice to the defendants on 3rd March, 2010 seeking specific performance of the contract. Upon refusal by the defendants, the suit for specific performance of the contract was filed.

3.4 After appraisal of the evidence and the material on record, the learned Civil Judge dismissed the suit observing that the plaintiff had not been ready and willing to perform his part of the contract. The purported inaction on the part of the plaintiff from the date of termination of the agreement for sale till the issue of legal notice, and admissions in the cross-examination of the plaintiff that the consent of the Society was not a legal requirement for effecting the sale, were arrayed against the plaintiff to return a finding that the plaintiff failed to establish continuous readiness and willingness to perform the contract.

3.5 Being aggrieved, the plaintiff preferred an appeal before the District Court.

3.6 By the impugned order, the learned District Judge dismissed the appeal concurring with the view of the trial Court. The delay on the part of the plaintiff in instituting the suit after the notice of termination of the agreement for sale dated 27th April, 2008 and the purported inaction, in the intervening period, weighed with the learned District Judge to answer the issue of readiness and willingness against the plaintiff.

4. Mr. Thipsay, the learned Counsel for the appellant, submitted that both the courts have committed a grave error in

law in returning the finding that the plaintiff was not ready and willing to perform his part of contract. Amplifying the submission, Mr. Thipsay would urge, both the Courts have erred in not properly appreciating the evidence, especially the fact that the plaintiff had paid a substantial part of consideration i.e. Rs.30,00,000/- and the said amount was refunded by the defendants on account of their failure to obtain 'no objection' from the Society. The parting of such huge consideration of Rs.30,00,000/- underscored both readiness and willingness on the part of the plaintiff to perform his part of the contract. Such misreading of evidence and the documents which record the circumstances in which the amount was refunded by the defendants gives rise to a substantial question of law.

5. Secondly, Mr. Thipsay would urge, the learned Civil Judge as well the learned District Judge completely misdirected themselves in holding that there was delay on the part of the plaintiff in seeking the relief of specific performance. Incontrovertibly, the suit was instituted within the stipulated period of limitation. Moreover, both the courts lost sight of the well-recognized principle that in suits for specific performance of contract to sell immovable property, time is not the essence of the contract. Once the suit was instituted within the stipulated

period of limitation, the courts could not have dismissed the suit for specific performance on the ground that there was delay in seeking specific performance of the contract. To buttress these submissions, Mr. Thipsay placed reliance on the judgments of the Supreme Court in the cases of *Chand Rani (Smt) (Dead) by LRs. vs. Kamal Rani (Smt)(Dead) By LRs.*¹, *Bismillah Begum (Smt) Dead by LRs. vs. Rahmatullah Khan (Dead) by LRs.*², *P. Daivasigamani vs. S. Sambandan*³ and *R. Lakshmikantham vs. Devaraj*⁴.

6. Mr. Thipsay would further urge that, the learned Civil Judge and the learned District Judge committed a manifest error in placing reliance on the admissions in the cross-examination that, in law, 'consent' of the Society (D2) was not necessary for effecting a transfer, when there was an express stipulation in the agreement for sale that the defendants would obtain the consent of the Society before the sale of the subject flat. Such misconstruction of the document and evidence has resulted in a complete miscarriage of justice, submitted Mr. Thipsay.

1 (1993) 1 Supreme Court Cased 519.

2 (1998) 2 Supreme Court Cases 226.

3 (2022) 14 Supreme Court Cases 793.

4 (2019) 8 Supreme Court Cases 62.

7. Per contra, Ms. Merchant, the learned Counsel for the respondents, submitted that the impugned decree is rested on sound legal reasoning. The plaintiff, despite being cognizant of the fact that the consent of the Society (D2) was not warranted, insisted for the same and, thus, the courts were justified in holding that the plaintiff was not ready and willing to perform his contract. In the circumstances of the case, when the defendants sought to terminate the agreement for sale, the plaintiff never offered to complete the transaction by paying the balance consideration, without insisting for the consent of the Society. After a delay of almost two years, the plaintiff gave the pre-suit legal notice. Thus, no question of law, much less a substantial question of law, arises for determination in this appeal, urged Ms. Merchant.

8. It is trite, in case of sale of immovable property, there is a presumption against time being the essence of the contract. In the case of *Chand Rani* (supra), the Constitution Bench of the Supreme Court, after analysis of the precedents, enunciated that in case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer

that, it is to be performed in the reasonable time if the conditions are evident;

- (i) from the express terms of the contract;
- (ii) from the nature of the property; and
- (iii) from the surrounding circumstances, for example; the object of making the contract.

9. In the facts of the case, the suit appeared to be within the statutory period of limitation, as the suit was instituted on 10th October, 2010, even if it is assumed that the refusal to perform the contract became known to the plaintiff from the communication dated 27th April, 2008. The Courts have proceeded on the premise that there was delay in instituting the suit from the date of the termination of the agreement for sale and, therefore, the plaintiff was not entitled for the discretionary relief of specific performance of the contract.

10. In the case of ***R. Lakshmikantham*** (supra) the Supreme Court did not approve the view of the High Court that the delay in filing the suit indicated that the plaintiff was not ready and willing to perform his part of the contract in the said case. The Supreme Court enunciated, in India it is well settled that the rule of equity that exists in England, does not apply, and so long

as a suit for specific performance is filed within the period of limitation, delay cannot be put against the plaintiff.

11. It would be contextually relevant to note that in a suit for specific performance, the element of delay comes in the frame in different contexts. Even if the delay does not exceed the stipulated period of limitation (in which case the suit would be barred by limitation) in a given fact-situation the length of delay bears upon the exercise of discretion.

12. In the case of *Motilal Jain vs. Ramdasi Devi (Smt) and others*⁵, the Supreme Court expounded the aspects of delay which become relevant in a suit for specific performance. The Supreme Court reminded that, “it may be apt to bear in mind the following aspects of delay which are relevant in a case for specific performance of contract for sale of immovable property:

- (i) Delay running beyond the period prescribed under the Limitation Act;
- (ii) Delay in cases where though the suit is within the period of limitation, yet:
 - (a) due to delay the third parties have acquired rights in the subject-matter of suit;

5 (2000) 6 Supreme Court Cases 420.

(b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief.”

13. In the case of *K. S. Vidyanandam and others vs. Vairavan*⁶, the Supreme Court expressly observed that from the presumption that the time is not essence of the contract in the case of agreement for sale and that the period of limitation prescribed for filing a suit for specific performance was three years, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that, time is essence of the contract) should be decreed provided it is filed within the period of limitation, notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party.

14. In the case of *Saradamani Kandappan vs. S. Rajalakshmi and others*⁷, after following the pronouncement in the case of *Chand Rani* (supra), the Supreme Court postulated that the 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

6 (1997) 3 Supreme Court Cases 1.

7 (2011) 12 Supreme Court Cases 18.

necessitating the sale. The observations of the Supreme Court in paragraph 28 read as under:

“28. 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.”

15. In the backdrop of the aforesaid position in law, reverting to the facts of the case, the circumstances in which the agreement for sale was professed to be terminated by the defendants assumed critical salience. Firstly, the defendants had done all that was within their power in obtaining the consent of the Society (D2). Initially, the defendants applied to the Society (D2). Upon its refusal, the defendants approached the Deputy Registrar, Co-operative Societies, for the redressal of their grievance. Secondly, the plaintiff conceded in the cross-examination, in no unequivocal terms that, he was aware that, ‘no objection certificate’, from the Society was not a necessary requirement for completing the sale transaction. Thirdly, the

defendants had put the plaintiff to notice that on account of the delay, the defendants were suffering financial loss. The letters dated 18th April, 2008 and 27th April, 2008 spell out the then situation in the life of the defendants. As there was no response to the first letter dated 18th April, 2008, it appears the defendants terminated the agreement vide communication dated 27th April, 2008. The said letter was served on the plaintiff on 30th April, 2008. Fourthly, in response to the letter dated 18th April, 2008 though the plaintiff declined to terminate the agreement, yet, did not offer to make payment of the balance consideration. Fifthly, there was complete inaction on the part of the plaintiff from May 2008 till the legal notice was addressed on 3rd March, 2010.

16. The submission of Mr. Thipsay that since there was a stipulation in the agreement for sale that the defendants would obtain the consent of the Society before the execution of the sale deed, there was nothing wrong on the part of the plaintiff in insisting for the compliance of the said condition, though appealing at the first blush, on a close scrutiny, reflects upon the willingness of the plaintiff to perform his part of the contract. The plaintiff could not have insisted for the performance of the said condition, which was neither necessary

for the completion of the transaction nor possible to be performed by the defendants as there was no obligation on the part of the Society (D2) to issue such consent. In a sense, the plaintiff insisted for performance of an impossibility.

17. In the totality of the circumstances, where the plaintiff was put to notice that, on account of the advanced age of the defendants, and the financial loss, the defendants were suffering on account of the delay, the transaction was required to be completed by payment of balance consideration, the Courts have not committed any error in arraying the aspect of delay against the plaintiff in assessing the readiness and willingness on the part of the plaintiff. In the peculiar facts of the case, the acceptance of the refund of Rs.30,00,000/-, indicates the strictness with which the plaintiff insisted for the compliance of the condition of obtaining consent of the Society (D2) rather than demonstrating the readiness and willingness on the part of the plaintiff, as was sought to be canvassed by Mr. Thipsay.

18. In the aforesaid view of the matter, I am not inclined to accede to the submissions on behalf of the appellant that the misconstruction of the documents and evidence gives rise to a substantial question of law on the aspect of appreciation as to

the readiness and willingness to perform the contract on the part of the plaintiff. The learned Civil Judge as well the learned District Judge have correctly exercised the discretion in refusing the specific performance. Resultantly, the second appeal deserves to be dismissed.

19. Hence, the following order:

: O R D E R :

- (i)** The appeal stands dismissed.
- (ii)** In view of dismissal of the appeal, IA/3044/2022 stands disposed.

[N. J. JAMADAR, J.]

At this stage, the learned Counsel for the appellant seeks continuation of the *status quo*.

Having regard to the nature of the controversy and the reasons which weighed with this Court in dismissing the Second Appeal, the prayer for continuation of the *status quo* stands rejected.

Mr. Thipsay, the learned Counsel for the appellant, without prejudice to the rights and contentions of the appellant,

seeks a direction for the refund of the sum of Rs. 1 Lakh which was paid by way of earnest amount.

Ms. Merchant, the learned Counsel for the respondents - defendants, on instructions, submits that the respondents - defendants are willing to return the said amount of Rs.1 Lakh to the appellant.

In view of the consent of the respondents - defendants, the respondents – defendants are directed to refund the amount of Rs.1 Lakh to the appellant, within a period of four weeks from today, without prejudice to the rights and contentions of the parties.

[N. J. JAMADAR, J.]