

HIGH COURT OF GUJARAT

PATEL ISHWARLAL SHIVRAM

Versus

RAJPUT ADAJI MEGHAJI HEIRS OF DECEASED RAJPUT TAKHAJI M

Date of Decision: 18 August 2011

Citation: 2011 LawSuit(Guj) 1150

Hon'ble Judges: [K S Jhaveri](#)

Case Type: Second Appeal

Case No: 242 of 1991

Subject: Civil

Acts Referred:

[Code Of Civil Procedure, 1908 Sec 100](#)

Final Decision: Application disposed

Advocates: [Prakash K Jani](#), [R C Jani](#)

Cases Referred in (+): 12

K S Jhaveri, J.

[1] The present appeal is one under section 100 of the Code of Civil Procedure, wherein the appellants are the original defedants and the respondents are the original plaintiffs.

1.1 The appellants have challenged the judgement and order dated 05.09.1991 passed by the Extra Assistant Judge, Mehsana in Regular Civil Appeal No. 59 of 1990 whereby the appeal preferred by the original defendants was dismissed and the decree dated 31.03.1990 passed by the Civil Judge (S.D.) Sidhpur in Civil Suit No. 104 of 1981 was confirmed.

[2] The scope of section 100 CPC, and the powers of the High Court while exercising jurisdiction as a second appellate court are by now well demarcated and require no detailed discussion. The Supreme Court has, in the case of

(i) [Ramaswamy Kalingaryar Vs. Mathayan Padayachi](#), 1992 Supp1 SCC 712,

(ii) [Kashibai w/o of Lachiram vs PARWATIBAI LACHIRAM](#), 1995 7 JT 48 and

(iii) [Parsini \(dead\) through Legal Representatives Vs. Atma Ram](#), 1996 AIR(SC) 1558, clearly reiterated the principle that the High Court cannot, while functioning as a second appellate court under section 100 CPC, upset the findings of fact recorded by the lower appellate court by reassessing the evidence, or reassess the qualitative value of such evidence on record, and thus cannot reverse such findings of fact. In fact, the High Court cannot interfere with such findings of fact even by examining or reappreciating the evidence from the aspect of "sufficiency of proof".

[3] The pertinent facts, in brief, leading to the present appeal are as under:

3.1 Out of the land bearing S.No. 392 situated in village Dasaj, Sidhpur, the land on the northern side admeasuring 3 bighas was a joint property of the original plaintiffs and the same was sold conditionally to the original defendant no. 1 and deceased Ratnabai Ambalal by registered document on 12.05.1955. The agreement of repurchase was also executed on the same day. It is the case of the original plaintiffs that on 12.05.1955 when the property was sold to the defendants, an agreement was also executed by the defendants in favour of the plaintiffs for repurchase of the property and according to this agreement the original plaintiffs had to pay Rs. 4056/- within 26 years from the date of the sale deed.

3.2 It was the case of the plaintiffs that they were ready to perform their part of contract and therefore notice dated 20.11.1980 was served upon the defendants calling upon the defendants to recover the amount of Rs. 4056/- from the plaintiffs and execute the document in favour of the present plaintiffs. It is also the case of the plaintiffs that the defendants gave a vague and evasive reply to the notice dated 20.11.1980 and therefor the plaintiffs filed civil suit for specific performance of the contract. The trial court after hearing the parties decreed the suit in favour of the original plaintiffs.

[4] Being aggrieved by the said judgement and decree dated the defendants preferred Regular Civil Appeal before the lower appellate court. After a detailed discussion on the averments and pleadings of the parties and after reconsideration and reappreciating of the entire evidence on record, the lower appellate Court confirmed the findings of fact recorded by the trial Court and dismissed the appeal filed by the appellants vide judgement and order dated 05.09.1991. Hence, this second appeal has been filed by the appellants-original defendants.

[5] Mr. M.R. Vyas, learned advocate appearing for Mr. RC Jani for the appellants submitted that time is the essence of the contract and when the specific time is mentioned in the document for repurchase the plaintiffs are not entitled to get the

specific performance of the agreement after the period is over. He submitted that this specific term is mentioned in the document Ex. 101 and that looking to the said condition therein it is very clear that the plaintiffs are entitled to redeem the property before the completion of the 26th year from the date of execution.

5.1 Mr. Vyas further submitted that in the notice dated 20.11.1980 the plaintiffs had not categorically mentioned the date on which they wanted to perform the agreement and therefore they had given another notice dated 01.07.1981 and in that notice they had categorically stated that they had come to perform their part and are prepared to pay the amount of Rs. 4056/-. In that view of the matter, he submitted that the plaintiffs right to repurchase the property was extinguished and the suit was filed after the period of limitation and the same was time-barred.

5.2 In support of his submissions, Mr.M.R Vyas relied upon the following decisions:

- (i) In the case of [Mehdi Hussain Khan vs. Nusrat Hasan](#), 2004 AIR(AP) 123.
- (ii) In the case of Shanmugam Pillai and othes vs. Annalakshmi Ammal and Others,1950 AIR(FC) 38.
- (iii) In the case of [K. Simrathmull vs. Nanjalinmgiah Gowder](#), 1963 AIR(SC) 1182.
- (iv) In the case of [Govind Prasad Chaturvedi vs. Hari Dutt Shastri and Another](#), 1977 AIR(SC) 1005.
- (v) In the case of [Gomathinayagam Pillai and Others vs. Palaniswami Nadar](#), 1967 AIR(SC) 868.
- (vi) In the case of [Sambhunath Chakravarty vs. Smt. Sushama Sinha](#), 1980 AIR(Cal) 5.
- (vii) In the case of [N. Pattay Gounder vs. P.L. Bapuswami](#), 1961 AIR(Mad) 276.

[6] Mr. Keyur Vyas, learned advocate appearing for the respondents-original plaintiffs supported the orders of the courts below and submitted that in view of the concurrent findings, this court may not interfere in the appeal.

6.1 Mr. Keyur Vyas submitted that the notice Ex. 103 is given within the time of specific performance and that the notice dated 12.11.1980 clearly shows that the plaintiffs are prepared to perform their part of agreement and had called upon the defendants to perform their part of the agreement. He submitted that both the courts have rightly held that original plaintiffs are ready and willing to perform their part of the contract and also called upon the defendants to execute their part of the

contract by notice dated 12.11.1980 within 26 years of the execution of the agreement.

6.2 Mr. Keyur Vyas has relied upon a recent decision of the Apex Court in the case of [Balasaheb Dayandeo Naik \(Dead\) Through L.Rs. & Ors. Vs. Appasaheb Dattatraya Pawar](#), 2008 AIR(SC) 1205 wherein as the defendant could not substantiate plea that time was essence of contract and that it was plaintiffs who avoided to perform their part the suit was decreed in favour of the plaintiffs.

[7] In substance, the lower Appellate Court found that the plaintiffs are entitled to get the specific performance of the contract. On the date of filing of the suit, the right of the plaintiffs was not extinguished because they had already demanded and the same was refused by the defendants and therefore the plaintiffs had the right to file the suit. The lower appellate court also held that the plaintiffs had got the right to repurchase at the time of the suit and that the rights were not extinguished before calling upon the defendants vide notice Ex. 103.

7.1 While admitting the present appeal, this court has framed the following substantial question of law:

(1) Whether in the facts and circumstances of the case construction of the documents dated 12/5/55 by the lower Court and more particularly condition as regards payment of money in 26th year is right in view of the decisions [N PATTAY GOUNDER vs P L BAPUSWAMI](#), 1961 AIR(Mad) 276K [SIMRATHMULL vs NANJALINGIAH GOWDER](#), 1963 AIR(SC) 1182 [GOVIND PRASAD CHATURVEDI vs HARI DUTT SHASTRI](#), 1977 AIR(SC) 1005, [SAMBHUNATH CHAKRAVARTY vs SM SUSHAMA SINHA](#), 1980 AIR(Cal) 5."

7.2 In the present case, a crucial point is whether the plaintiffs had to pay the amount within 26 years or whether they had showed their readiness and willingness to perform the contract. As per the relevant provisions of the Specific Relief Act whenever a plaintiff wants to get the specific performance of the agreement he has to show his readiness and willingness to perform his part of the contract and has to call upon the other side to perform his part of the contract. The plaintiffs in the present case had categorically given notice dated 20.11.1980 which is produced at Ex. 103. The fact that the date is not mentioned in the notice shall not absolve the defendants from performing their part of the contract when the notice categorically mentions that the plaintiffs are ready and willing to perform their part of the agreement. However, the defendants did not give a proper reply and evaded the notice.

[8] In fact, the decisions relied upon by Mr. Vyas, learned advocate for the appellant shall not be of help to the appellants as in the decision in the case of Gomathinayagam Pillai (supra) it is settled law that fixation of the period within which the contract had to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to the sale of immovable property it will normally be presumed that the time is not the essence of the contract.

8.1 In the case of Govind Prasad Chaturvedi (supra) it is held that 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.

8.2 In the case of Sambunath Chakravarty (supra), the Calcutta High Court relying on the aforesaid two decisions has reiterated that in a contract of sale of immovable property the time is not the essence of the contract.

[9] In fact the Apex Court in the decision in the case of Balasaheb Dayanadeo Naik (Dead) (supra), had held in paras 12, 13 & 14 as under: "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. "

[10] As already discussed by me hereinabove, the scope and ambit of the present appeal under section 100, CPC, is extremely narrow. It is not open to me to reappraise the evidence on record, and to arrive at findings contrary to the findings of fact recorded by the two courts below, particularly when such findings are neither

perverse nor absurd, and when the judgement and decrees impugned herein cannot be said to be based on "no evidence".

[11] In spite of the earnest efforts of the learned counsel for the appellant, I am unable to find as acceptable any other view as regards the appreciation of the evidence and the conclusions to be drawn therefrom.

[12] Learned counsel for the appellant is unable, on the particular facts of the case, to make out any substantial question of law on the basis of which the judgements and decrees of the two courts below would require interference by this court. Hence, the appeal is dismissed.

Civil Application also stands disposed of accordingly.

