

Received on : 05.08.2015
Presented on: 05.08.2015
Decided on : 31.10.2015
Duration : 0Y 2M 26D

**IN THE COURT OF 3rd JT. CIVIL JUDGE SENIOR DIVN., PUNE
(PRESIDED OVER BY SMT. S.S. NAGUR)**

**SPECIAL CIVIL SUIT NO. 978/2015
Exh. No.**

Kiran Bhikoba Kudale

Age : 35 years, Occupation : Business,
R/at : 422, Ghorpadi Peth,
Pune – 411 042

..... Plaintiff

Versus

1. Shri. Santosh Baban Thite
Age : 40 years, Occupation : Business,
2. Shri. Baban Dnyanoba Thite
Age : 63 years,
Occupation : Business and Agriculture
Both are R/at : 873, Ambegaon Budruk,
Dattanagar, Taluka Haveli,
District Pune
3. Shri. Vishal Balasaheb Yadav
Age : 39 years,
Occupation : Business and Agriculture
R/at : 550 Ghorpadi Peth, Pune – 411 042
4. Shri. Amar Pralhad Gaikwad
Age : 38 years,
Occupation : Business and Agriculture,
5. Shri. Sagar Pralhad Gaikwad
Age : 35 years,
Occupation : Business and Agriculture
No. 4 and 5 R/at : 596, Ghorpadi Peth,
Pune – 411 042
6. Shri. Sunil Nanasaheb Kolpe

Age : 42 years,
Occupation : Business and Agriculture,
R/at : A-101, Near Pushpa Wonder City,
Katraj, Pune – 411 046.Defendants

**Suit for Specific Performance of
Agreement**

Appearances – Adv. Shri.S.B. Gujarathi for plaintiff
Adv. Shri.D.V. Takawale for defendant no. 2
Adv. Shri.A.V. Londhe for defendant no. 3 to 6

J U D G M E N T
(Delivered on 31st October 2015)

1. The plaintiff has filed the suit against the defendants for specific performance of agreement dated 10.05.2008.

Brief facts of the application are as under :

2. The defendant filed application at Exh. 39 contended that the suit of the plaintiff is not within limitation. Therefore there is bar of jurisdiction under Section 9A of Code of Civil Procedure and prayed for dismissing the suit on the ground of limitation. The following issue was framed and the parties were given liberty to adduce evidence if any :

<u>Sr No</u>	<u>Issues</u>	<u>Findings</u>
1.	Whether the suit is within limitation?	No

REASONS

As to Issue No. 1 :

3. The plaintiff has filed pursis at Exh. 50 that he does not desire to lead evidence on the point of preliminary issue.

4. The defendant nos. 3 to 6 filed pursis at Exh. 71, closing their evidence on the ground that the burden is on the plaintiff to prove that suit is within limitation. The said burden is not discharged by the plaintiff therefore the defendant does not desire to lead oral evidence and has closed evidence.

5. Heard Advocate Shri. S.B. Gujarathi for the plaintiff and Advocate Shri. A.V. Londhe for the defendant no. 3 to 6.

6. The plaintiff has come with a case that the suit property bearing Survey No. 34/13B/2A/1A/2/2/2/3 admeasuring 2 hector situated at Mouze Ambegaon Budruk, Taluka Haveli District Pune is owned by the defendants. The defendant no. 1 was in need of money therefore he desired to sell the suit property and the plaintiff being his friend agreed to purchase the suit property for consideration of Rs.5,00,000/- per guntha. The defendant has executed agreement of sale dated 10.05.2008 and the plaintiff has paid Rs.5,00,000/- to the defendant as part consideration. The plaintiff came across public notice in daily newspaper Prabhat dated 27.09.2009. He raised objection requested the defendant to execute the sale deed in his favour. The defendant on the pretext that his elder family members are ill and they have to incur expenses, requested the plaintiff that he will get the suit property measured and execute sale deed.

The defendant avoided to meet the plaintiff thereafter. The plaintiff agreed to pay additional amount of Rs.1,00,000/- as per demand of the defendant nos. 1 and 2. The defendants only gave assurances but not executed sale deed. The plaintiff had been Talathi office on 02.07.2015 and obtained 7/12 extract of the suit property. At that time he came to know that the defendant nos. 3 to 6 have sold the property. The defendant nos. 3 to 6 and defendant nos. 1 and 2 are residing in same area therefore they are aware of the transaction of the suit property with the plaintiff. Hence this suit.

7. Advocate Shri. A.V. Londhe for the defendant nos. 3 to 6 argued that Article 54 of Limitation Act is applicable for Specific Performance of Agreement. Article 54 of Limitation Act provides that period of limitation will start running after the completion of period prescribed in the agreement and if the period is not prescribed then from the date of refusal to perform the contract. Advocate Shri. A.V. Londhe has drawn my attention to the documents relied by the defendant which are of the plaintiff himself to show that the plaintiff had knowledge of the refusal as well as agreement was to be executed within six months. The limitation period for filing the suit has been expired long back, even though both the period is considered, as per Article 54 of Limitation Act has been considered. On the other hand Advocate Shri. S.B. Gujarathi for the plaintiff argued that there is novation of contract on the ground that the defendant orally requested the plaintiff that they will get the suit property measured thereafter

execute the sale deed. The suit is within limitation because the defendants have not complied their part of contract. Therefore contents of the pleading in the plaint and documents which are relied by the parties is to be considered for coming to the conclusion that whether the suit is within limitation.

8. The plaintiff in para no. 7 has contended that “दिनांक २७.०९.२००९ रोजीचे “दैनिक प्रभात” या वर्तमानपत्रामध्ये प्रतिवादी नं. १ यांचे नावाने वाद मिळकत विक्रीबाबत जाहीर नोटीस प्रसिध्द करण्यात आली व ती वादी यांचे वाचण्यात आली. वादींनी त्वरीत त्यास हरकत घेवून प्रतिवादी नं. १ व २ यांना दिनांक ०४.११.२००९ रोजी नोटीस पाठवून खरेदीखत करून घेण्यासाठी मागणी केली. परंतू सदर नोटीस प्रतिवादी नं. १ व २ यांना मिळाल्यानंतर त्यांनी वादींना “खरेदी किंमत वाढवून देत असल्यास खरेदीखत करून देतो” असे सांगितले.”

9. The plaintiff has contended that the defendant no. 1 and 2 thereafter agreed to sell the property to the plaintiff and has also demanded additional amount of Rs.1,00,000/-. Hence they assured that after getting the suit property measured, sale deed will be executed. In para no. 8, the plaintiff contended that “त्यानंतर अनेकदा प्रयत्न करूनही प्रतिवादी नं. १ व २ यांनी वादी यांची भेट घेण्याची टाळाटाळ केली. अखेर वादी यांनी प्रतिवादी नं. १ व २ यांना ठरलेल्या किंमतीपेक्षा रक्कम रुपये १,००,०००/- (अक्षरी रक्कम रुपये एक लाख फकत) वाढवून देण्याची वादी यांनी तयारी दर्शविली, परंतू त्यानंतरही प्रतिवादी नं. १ व २ यांचेकडून केवळ आश्वासनेच मिळाली.”

10. The above contention of the plaintiff in the plaint is to be

considered along with visar pavti and the notices issued by the plaintiff to the defendant during year 2009. Visar pavti is filed by the plaintiff at Exh. 67 contends that :

१) आंबेगाव बुदुक, ता. हवेली, जिल्हा पुणे येथील सव्हे नं. ३४/१३ ब / २अ / १अ / १अ ही जमीन जिचे क्षेत्र २ आर ही माझया मालकीची असून मला आलेल्या अडचणीमुळे ती विकायची आहे. म्हणून मी तुम्हाला रुपये १०,००,०००/- (अक्षरी रुपये दहा लाख फकत) रुपयांना देवू केली व तुम्ही या किंमतीस विकत घेण्याचे कबूल केले.
२) त्याप्रमाणे मला तुमचेकडून आजपर्यंत रुपये ५,००,०००/- (अक्षरी रुपये पाच लाख फकत) रोख स्वरुपात मिळाले. आता उरलेले रुपये पाच लाख तुम्ही मला आजपासून सहा महिन्याचे आत देवून वरील जमीनीचे खरेदीखत नोंदवून घ्यायचे आहे. या जमीनीवर माझयाशिवाय इतर कोणाचा हक्क नाही.
३) मला तुमच्याकडून जमीनीच्या किंमतीपैकी रुपये पाच लाख मिळाले आहेत. आता मी माझया जागेचे खरेदीखत दिनांक १०-११-२००८ पर्यंत उरलेली रक्कम घेवून करून देईल याकरीता ही पावती माझया स्वखुशीने समजून उमजून लिहून देत आहे.

11. It shows that the sale deed is to be executed on payment of Rs.5,00,000/- within six months to the defendant.

12. The plaintiff came across the notice issued to the defendant in daily newspaper Prabhat therefore he issued notice to the defendant on 04.11.2009 (Exh. 68) and called upon the defendant to execute sale deed within seven days. The important contents of the notice para no. 5 shows that “ताबडतोब दि. ०३/१०/२००९ रोजी तुमची गाठ घेवून सदर जाहीर नोटीसीबाबत तुमचेकडे विचारणा करताच तुम्ही आमचे अशिलांबरोबर भांडणे करून त्यांना काय करायचे ते करून घे, जमिनीचे खरेदीखत तुझयाशी करणार नाही वगैरे उध्दट भाषा वापरून आमचे अशिलांस तुम्ही हाकलून दिले.”. The para no. 6 of the said notice contends that “त्यानंतर गुपचुपपणे वर उल्लेख केलेली जमिन तुमचे पैकी नं. २ यांचे नावे

तुमचेपैकी नं. १ याने वर्ग केली व अन्य त्रयस्थ इसमास सदर मिळकत विक्रीने देण्याचा घाट घेतला.”

13. The above notice is the first one whereby the plaintiff called upon the defendant to execute sale deed within seven days on the ground that the defendant no. 1 has transferred the suit property to the defendant no. 2. This shows that the plaintiff was aware of the alienation of the suit property to the defendant no. 2. The plaintiff met the defendant but the defendant quarreled and has clearly told the plaintiff that he will not execute sale deed, is the contents of the para no. 5 of the notice. The date of refusal of execution of sale is 03.10.2009. On the basis of visar pavti the plaintiff was to comply the part of payment of Rs. 5,00,000/- within six months however the contents of the plaint in that respect is silent.

14. Article 54 of Limitation Act provides that limitation to perform the specific performance of agreement that the period of limitation begins to run from the date on which the contract was to be specifically performed and in case where the period is not prescribed, the limitation will run against the plaintiff either from the date of refusal or when the plaintiff has noticed that the performance is refused on the basis of documents i.e. visar pavti and the notice (Exh. 68) dated 04.11.2009. It could be gathered that the period of limitation started running against the defendant to file the suit and the suit was to be filed by the plaintiff within three years as under :

<i>Particulars of Document</i>	<i>Date</i>	<i>Period Prescribed in visar pavti six months</i>	<i>Suit was to be filed</i>
<i>Visar Pavti</i>	<i>10.05.2008</i>	<i>10.11.2008</i>	<i>10.11.2011</i>
<i>Notice of refusal (Exh. 68)</i>	<i>04.11.2009</i>	<i>---</i>	<i>04.11.2012</i>

15. The plaintiff has objected to the notice issued in daily newspaper Prabhat vide Exh. 70 dated 03.10.2009 wherein he contended that the defendants have agreed to execute the sale deed within six months after the receipt of Rs.5,00,000/- from the plaintiff. In this objection also the plaintiff contended that though the plaintiff was ready to pay the amount, the defendants avoided to execute the sale deed. The avoidance on the part of the execution of sale deed is itself refusal. The suit property for the first time transferred by sale deed dated 26.06.2009 executed between the defendant no. 1 and 2, thereafter the another sale deed is executed by the defendant no. 2 with the defendant no. 3 to 6 dated 22.02.2011. It is the contention of the plaintiff that when he had been to Talathi Office on 02.07.2015 and took out 7/12 extract of the suit property, he came to know that the suit property is transferred.

16. Advocate Shri. A.V. Londhe for the defendant no. 3 to 6 have relied on authorities reported in

i) Kalwa Devdattam and others Vs. Union of India AIR 1964 SC 880 that the question of onus probandi is certainly important in the early stages of case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations

of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties. ii) **K.S. Nanji and Company Vs. Jatashankar Dossa and others AIR 1961 SC 1474** that under the Evidence Act there is an essential distinction between the phrase “burden of proof” as a matter of law and pleading and as a matter of adducing evidence. Under Section 101 of the Evidence Act, the burden in the former sense is upon the party who comes to court to get a decision on the existence of certain facts which he asserts. The burden is constant throughout the trial; but the burden to prove in the sense of adducing evidence shifts from time to time having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other. iii) **Anil Rishi Vs. Gurbaksh Singh AIR 2006 SC 1971** that Section 101 is inflexible, in terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any which would dis entitle the plaintiff to the same. iv) **Naresh Lachmandas Aswani Vs. Haridas @ Hardas Lachmandas Aswani, Suit No. 808 of 2011 Hon'ble Bombay High Court dated 18.10.2013** that the initial onus is on the plaintiff to prove that the suit is within time. v) **Vidyadhar Vs. Mankikrao and another Air 1999 SC 1441 (1)** that under Section 3 (1) of Limitation Act, 1963, it is mandatory on the part of the court, to dismiss a suit, where the suit claims are barred by limitation, notwithstanding the factum of such bar of limitation being not set up as defence by defendants. vi) **K. Kallaihal Vs. Ningegownda AIR 1982 Karnataka 93** The principle that time stipulated in a contract for sale of immovable property is not the essence of contract has nothing to do with the period of limitation within which a suit for specific performance of contract has to be filed. One touches to the right of the parties to enforce contract and the other touches on the period within which that right has to be enforced. vii) **Subhash Chandra Kathuria Vs. Umed Singh AIR 2006 Delhi 194** viii) **Fatehji and Company and others Vs. L.M. Nagpal Civil Appeal No. 3912/ 2015 SC** that the original cause of action to the plaintiff arose on 2.12.1973, i.e. the date fixed for the performance of the contract. Thereafter the same stood extended till 1.2.1977 as requested by defendants. The plaintiff claimed oral extension of time but no particulars pleaded as to when and how. On the other hand even after knowing the dishonest intention of the sons of the second defendant with regard to the suit property in the year 1985, the plaintiff did not file the suit immediately. The suit filed in the year 1994 is barred

by limitation under Article 54 of Limitation Act. ix) **Janardhanam Prasad Vs. Ramdas 2007 DGLS (Soft.) 87** that the defendant may or may not be aware about agreement entered between the respondent. But he cannot raise a plea of absence of notice of sale deed which was registered document possession of the suit land by appellant admitted Registration of a document as well as possession would constitute notice. x) **Shrikrushna Keshav Kulkarni and others Vs. Balaji Ganesh Kulkarni AIR 1976 Bombay 342** that the case in which no date was fixed for the performance of the contract. The starting point of limitation is when the plaintiff has notice of refusal of performance. In the facts of this case the registered sale deed by defendant could be posted with knowledge that defendant refused to perform the contract. xi) **Gomathinayagam Pillai and others Vs. Pallaniswami Nadar AIR 1967 SC 868** that Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph : “When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract.” It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable; it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.

17. Advocate Shri. Gujarathi for the plaintiff argued that there

is novation of contract on the ground that the defendant agreed to get the suit property measured and thereafter will execute sale deed in favour of the plaintiff and also demanded additional amount of Rs.1,00,000/-. However the plaintiff has not entered in the witness box nor examined any person to prove the novation of contract. The plaintiff had opportunity to prove that there was novation of contract. However even looking into the notice issued by the plaintiff himself dated 04.11.2009, the plaintiff had knowledge that the suit property is alienated by the defendant nos. 1 and 2 in the year 2009. The plaintiff in the said notice called upon to execute sale deed within seven months however he did not prefer suit even after the said notice was issued but has filed this suit on 05.08.2015 contended that there is novation of contract. The said fact is not proved by the plaintiff even though he had opportunity to adduce evidence.

18. On the contrary the contents of the notice and even the plaint, para no. 8 shows that the defendants have refused to execute sale deed in favour of the plaintiff in the year 2009. The plaintiff in para no. 12 of the plaint shown cause of action that “सदर दाव्यास कारण, प्रतिवादी नं. १ यांनी प्रथमतः दिनांक १०.५.२००८ रोजी प्रतिवादी नं. १ व २ यांनी विसारपावतीचा करारनामा करून दिल्यामुळे त्याप्रमाणे हक्क व अधिकार असतांना पुन्हा सन २००९ व २०११ मध्ये प्रतिवादी नं. २ व ३ ते ६ यांनी खरेदीखत करून घेतल्यामुळे तसेच सदर दावा मिळकतीच्या रेकॉर्डवर दिनांक ०२.०७.२०१५ रोजी वादी यांना ७/१२ उता—यावर प्रतिवादी नं. ३ ते ६ यांच्या नावांची नोंद झाल्याने घडले, त्यानंतर वादीने दिनांक ०८.०७.२०१५ रोजी नोटीस पाठविली तेव्हा घडले, त्यानंतर रोजचे

रोज घडत आहे.”. On going through the cause of action it shows that the plaintiff's suit is not within limitation. The limitation started running on the basis of visar pavti dated 10.05.2008 from 10.11.2008. The suit should have been filed on or before 10.11.2011 as per Article 54 Part 1 the period is prescribed in the agreement. Even though for the sake of argument even it is considered that second part is applicable to the present facts of the case, the second part started running from the issuance of the notice dated 04.11.2009. The said should have filed on or before 04.11.2012. Advocate Shri. Londhe for the defendant has also drawn my attention to the Section 3 of Limitation Act that even though the defence is not taken by the other side, the suit was to be dismissed on the point of limitation. Section 3 of Limitation Act provides that the suit, appeal or application instituted after the prescribed period of limitation subject to the provisions of Section 4 to 24 be dismissed although limitation has not been set up as defence.

19. I have gone through the authorities relied by the defendants. The rule of limitation is a rule of procedure, when period of limitation is prescribed for institution of a suit. Section 3 of the Limitation Act bars institution of suit after prescribed period and the suit shall be dismissed though limitation has not been set up as a defence. The Article 54 of the Limitation Act as regards the suit for specific performance, the cause of action would arise from the date fixed for performance of the agreement, and in case when no such date is fixed, then it would

be from the day the plaintiff is made aware of the fact that the defendant refused to perform the agreement.

20. The above facts on record shows that the suit is not filed by the plaintiff within the period of limitation. Therefore the suit desires to be dismissed as there will be no point in continuing the suit and answering issue in negative, pass following order :

ORDER

- 1) The suit is dismissed with cost.
- 2) Decree be drawn accordingly

Place : Pune
Date : 31.10.2015

(S.S. Nagur)
3rd Joint Civil Judge S.D., Pune

Certificate

I affirm that the contents of this P.D.F. File judgment are same word for word as per original judgment

Name of Steno	:	Smt. B. J. Khandre
Court Name	:	Smt. S.S. Nagur, 3 rd Jt. Civil Judge, S.D. Pune
Date	:	03.12.2015
Judgment signed by PO. On	:	03.12.2015
Judgment uploaded on	:	03.12.2015