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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

***SECOND APPEAL NO. 305 OF 2015
with
CIVIL APPLICATION NO. 679 OF 2015***

Mr. Vijay Pandurang Shelke and Ors. ... Appellants/Applicants.

V/s.

M/s. Kunj Horticulture and Real Estate
Developers, A Partnership Firm registered
under the Partnership Act,
Through its Partners and Ors. ... Respondents.

Mr. A.V. Anturkar, Senior Advocate a/w. Amol Gatne i/b. S.B.
Deshmukh for the Appellants/Applicants.

Mr. Vishwajeet Sawant a/w. Prabhakar Jadhav for Respondents 1 &
2.

CORAM : N.M. Jamdar, J.

27 June, 2016.

Oral Order :-

By this Appeal, the Appellants challenge the concurrent Judgments and Orders passed by the learned Civil Judge, Senior Division, Pune dated 28 March 2006 and 11 November 2014 by the District Judge, Pune wherein the Suit filed by the Respondents was

decreed and the Appeal filed by the Appellants is dismissed. The decree passed by the learned Civil Judge was for specific performance of an agreement dated 20 May 1994.

2. Suit was filed by the Respondents for specific performance of an agreement dated 20 May 1994. It was the case of the Respondents – Plaintiffs that the Suit land bearing No. 831/1, admeasuring 8 Hectors, 80 Rs, which is the subject matter of the present proceedings was desired to be sold by the Appellants. The Respondents – Plaintiffs accordingly issued a public notice in the newspapers. The Respondents – Plaintiffs is a partnership firm. According to the Respondents – Plaintiffs, the Appellants agreed to sell the Suit land for consideration of Rs.35,000/- per acre i.e. the total of Rs.7,70,000/-, the Plaintiffs paid consideration of Rs.1,00,000/- by cash, pay order and cheques. The balance amount was to be paid on the execution of the sale deed. Since the Appellants refused to perform their part of the contract, the Respondents – Plaintiffs instituted the Special Civil Suit No. 360 of 1996. The Appellants filed their written statement and contested the Suit. They denied the agreement. They denied the readiness and willingness of the Respondents – Plaintiffs. Parties led oral and documentary evidence. The learned Civil Judge framed issues as to the execution of the document, and readiness and willingness on the part of the Appellants, and held in favour of the Respondents –

Plaintiffs and decreed the Suit directing the Appellants to execute the registered sale deed after obtaining necessary permissions.

3. The Civil Appeal No. 49 of 2013 was filed by the present Appellants and the other Defendants filed a Civil Appeal No. 50 of 2013. The learned District Judge confirmed the finding of the learned Civil Judge and dismissed the Appeal by judgment and order dated 11 November 2014. As per the instructions of the learned Counsel for the parties, as against the dismissal of the Appeals, the other Defendants who had filed Appeal No. 50 of 2013, have not filed any Second Appeal so far.

4. Heard Mr. Anturkar, learned Senior Advocate for the Appellants and Mr. Sawant, learned Counsel for the Respondents.

5. Mr. Anturkar, learned Senior Advocate appearing on behalf of the Appellants firstly submitted that the Appellate Court has not framed proper issues and which has resulted in prejudice to the Appellants. He relied upon the decision in the case of *Santosh Hazari v/s. Purushottam Tiwari (deceased) by L.Rs.* Reported in (2001) 3 SCC 179. He submitted that the aspect of readiness and willingness of the Respondents – Plaintiffs has not been considered by both the Courts. According to the learned Counsel, in view of the admission given the Respondents – Plaintiffs in the cross-

examination that there are no sufficient funds in the Bank Account of partnership to the extent of consideration, is clear and unequivocal. He submitted that having financial ability, is essential before a decree of specific performance can be granted. He relied upon the decision of the Apex Court in the case of *N.P. Thirugnanam (decd) by L.Rs. v/s. Dr. R. Jagan Mohan Rao and Ors.* reported in 1995(5) SCC 115 more particularly, on para 5. The learned Counsel also submitted that once in the written statement the Appellants had taken a stand that the Respondents – Plaintiffs were not ready and willing to perform their part of contract, the burden had shifted on the Respondents to prove the said fact. The learned Counsel for the Respondents submitted that the Respondents – Plaintiffs had fully discharged their burden of showing that the Respondent – Plaintiff were ready and willing to perform their part of contract and both the Courts have correctly assessed the evidence in that regard.

6. As regard the framing of issues is concerned, the primary point that needs to be considered what is the failure of justice or prejudice that has occasioned due to non framing of issues. Firstly, the learned District Judge was confirming the Judgment of the learned Civil Judge and was not reversing the same. In the case of *Santosh Hazari* it was the case where the decision was reversed by the Appellate Court. The Apex Court found that the well considered

judgment of the Trial Court was reversed by the Appellate Court in very cryptic manner. Such is not the present case. Though it is desirable even in a confirming judgment to frame issues, main question is whether the learned District Judge has omitted to consider any argument or it has led to any prejudice. It is not that the Appellate Court has not adverted to the issue of readiness and willingness. It is worth noting that in the Appeal Memo before the District Court, no ground at all was taken challenging the finding of the learned Civil Judge that the Respondents – Plaintiffs are ready and willing to perform the contract. The argument that was advanced in the District Court was of only regarding the deposit of money in the Court and failure of the Respondents – Plaintiffs to deposit the money in the Court. The argument that in view of the admission, the financial ability of the Respondents – Plaintiffs to pay the amount is doubtful, was never advanced before the Appellate Court. Therefore, it cannot be said that there was any prejudice caused to the Appellants by framing a specific issue to that effect.

7. Turning now to the question of the admission which is heavily relied on by the learned Counsel for the Appellant. In the case of *N.P. Thirugnanam*, the Apex Court has observed that the specific performance is an equitable remedy and discretion has to be exercised as per law. The Apex Court has laid down various considerations for the exercise of this discretion. The factum of

readiness and willingness needs to be adjudged with reference to the conduct of the parties and the attending circumstances. The Court may infer from the facts and circumstances whether a plaintiff is ready and was always ready and willing to perform part of the contract. As one of the incidence, the Apex Court has noted that the financial ability of the Plaintiffs can be taken into consideration and the continuous readiness and willingness on the part of the Plaintiffs is a condition precedent.

8. In the present case the Respondents – Plaintiffs has pleaded in the plaint as well as in the evidence that they were always ready and willing to perform their part of the contract. Not only that various steps were taken for issuance of public notice taking title search etc. These factors have been considered by both the Courts as sufficient enough to infer readiness and willingness. The question is whether this concurrent finding of fact can be over-ruled only on the statement made in the cross-examination that partnership firm did not have requisite amount in the bank account. A question was asked whether there was enough amount in the bank account at that time. The cross-examination of this witness has not been taken to any further logical conclusion. There could be various reasons why in a partnership account, money is not kept deposited. This position does not lead to anything concrete. There is no admission that the firm was not capable of generating the amount. If such admission

would have been given, it would be a different matter. Specific performance of an agreement, execution of which is proved, is generally required to be granted, unless it is not equitable or does not fit within parameters laid down. On the basis of such inconclusive one line in the cross examination, the concurrent finding of fact on readiness and willingness cannot be overturned. All the other factors have been duly taken into consideration by both the Courts to interfere readiness and willingness. No other point was urged. The points that have been urged did not lead to any question of law. The Appeal is dismissed. The Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)