IN THE HIGH COURT OF JUDICATURE AT BOMBAY CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 419 OF 2016

Shri Bhimrao Dadu Khot,
R/o. Badyachiwadi, Tal. Gadhinglaj,
Dist. Kolhapur. … Appellant
v/s
1. Shri Ramchandra Ganapati Powar
(since deceased, through legal heirs)
1A) Mrs.Shantabai Ramchandra Powar
& ors. … Respondents

Mr.Amit Borkar for the appellant.

Mr.G.N. Salunke for the respondents.

Coram: N.M. Jamdar, J.

Dated: 29 June 2016

ORAL ORDER:

The Appellant challenges the concurrent judgment and order passed by the Civil Judge, Junior Division, Gadhinglaj and the District Judge, Gadhinglaj, dismissing the suit and appeal filed by the Appellant.

2 The Appellant/original Plaintiff, filed the Suit bearing R.C. Suit No.139 of 1994 seeking specific performance of an agreement dated 28 April 1972. According to the Appellant, the agreement was

executed between the parties for which consideration of Rs.5,500/- was fixed, out of which Rs.4,000/- was given. The agreement was to be executed within a period of one year upon payment of remaining amount. Thereafter, by subsequent agreement in the year 1976, the remaining amount was executed and date of performance was extended, and there was no time limit. According to the Appellant, inspite of issuing a notice on 15 April 1993, the Respondent refused to execute the sale deed, hence the suit was filed.

3 Both the Courts, after considering the facts and circumstances, came to the conclusion that the Appellant was not ready and willing to perform his part of contract and the suit was not within limitation. Accordingly, the suit and appeal have been dismissed.

4 Learned counsel for the Appellant submitted that, in the agreement subsequently entered into on 18 October 1976, time was not the essence of the contract. He submitted that, more than 90% of the amount has been paid and therefore both the Courts have not correctly appreciated these factors before holding that the Appellant was not ready and willing to perform his part of contract. Relying on the decision in the case of *Motilal Jain v/s Ramdasi Devi (Smt.) & ors.*[1] learned counsel submitted that, once 90% of the amount was paid and small amount remained to be paid, the only thing that was to be left on the part of the Appellant was to pay the balance amount,

1 (2000) 6 SCC 420

and therefore it has to be held that the Appellant was ready and willing. Learned counsel, relying on the decision in the case *His Holiness Acharya Swami Ganesh Dassji v/s Sita Ram Thapar*[2], submitted that the financial ability of the Appellant to pay the balance amount was not in doubt and it should have been considered as a relevant factor to hold the factor of readiness and willingness in favour of the Appellant.

5 Whether a party is ready and willing to perform the part contract, is essentially a question of fact. There are various ingredients which go into the enquiry to ascertain readiness and willingness. There is no mathematical formula. All the ingredients cumulatively have to be considered in each case. There are however certain relevant parameters, such as, financial ability, acts of calling upon the vendors to execute the deed, time span, etc. In the present case, the agreement was initially entered into in the year 1972 and the second one in the year 1976. Thereafter from 1976 to 1993, absolutely nothing was done by the Appellant. The Appellant has failed to establish that even a single notice was sent during the period of 17 years. An argument was sought to be advanced before the courts below that, permission of consolidation authority was necessary, however, both the courts have rendered a finding that the land was exempted from the consolidation scheme. Therefore, merely because small part of the amount remained to be paid, does not mean

2 (1996) 4 SCC 526

that the Appellant can approach the Court of law at any time he wishes. In the case of *Motilal Jain*, the facts were that the contract was executed on 20 February 1977 and the balance was to be paid within five months. The Appellant therein had established that the Respondents did not accept the amount due. Thereafter the Appellant therein immediately sent three notices and within nine months of the last notice, filed a suit. It was not only substantial consideration was paid, but there was immediate follow up action taken on the Appellant therein, which is not in the present case.

6 As regard the decision in the case of *Dassji*, which is cited for demonstrating the financial ability, both the Courts have not non-suited the Appellant on the ground of financial ability. As stated earlier, even though small amount remained to be paid, the Appellant ought to have approached the Court of law in time if he wanted to seek specific performance. Furthermore, the amount is not that small but almost 1/4th of the consideration. The relief of specific performance is discretionary. The rise in prices of immovable properties is a circumstance which the Court cannot lose sight of. In view of the complete inaction of the Appellant for almost two decades, both the Courts have rightly concluded that the Appellant was not ready and willing. To grant specific performance of an agreement of the year 1972, at such a belated stage, is highly equitable.

7 No substantial question of law arises. The second appeal is accordingly dismissed.

(N. M. Jamdar, J.)