

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.101 of 2015
(Namdeo s/o Tukaram Warade v. Prafulla s/o Amrutlal Chaware)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri R.N. Badhe, Advocate for Appellant.
Shri J.J. Chandurkar, Advocate for Respondent.

Coram : R.K. Deshpande, J.

Dated : 5th July, 2016

The Trial Court passed a decree for specific performanc of contract in Regular Civil Suit No.76 of 2004 on 16-8-2006. The lower Appellate Court has concurred with the findings recorded by the Trial Court, and Regular Civil Appeal No.75 of 2012 (Old RCA No.86 of 2007) has been dismissed on 15-11-2014. Hence, the original defendant is before this Court in this second appeal.

On 23-2-2015, this Court passed an order as under :

“ The agreement for sale of House property dated 28-5-2001 fixed the time for executing the sale deed within 11 months. The only notice issued by the plaintiff to the defendant is dated 10-6-2004 and suit for specific performance has been filed on 21-7-2004. The trial Court did not frame any issue as regards readiness and

willingness of the plaintiff to perform his part of the agreement. The appellate Court though framed point No.2 in that regard, evidence on the aspect of readiness and willingness does not appear to have been considered.

Issue notice to the respondent on the following substantial questions of law:

(1) Whether the plaintiff has proved his readiness and willingness to perform his part of the agreement in terms of Section 16(c) of the Specific Relief Act, 1963?

(2) Whether the failure on the part of the trial Court to frame issue regarding readiness and willingness of the plaintiff has vitiated its judgment?

Notice returnable on 24-3-2015.

CIVIL APPLICATION (S) NO.162 OF 2015.

Issue notice to the non-applicant returnable on 24-3-2015.

Hamdast granted.

Till the returnable date, the possession of the applicant shall remain protected.”

Thereafter, on 16-2-2016, this Court passed an order as under :

“ Learned Adv. Mr. Badhe for the appellant and learned counsel Mr. Chandurkar for the respondent state

that they would like to address this Court again as to framing of Substantial Question of Law, since hearing both the sides for doing so would be necessary.

Stand over for four weeks.

Interim order to continue.”

This is how the matter is listed today for admission and hearing on the existence of substantial question of law.

It is no doubt true that the Trial Court did not frame an issue as to readiness and willingness on the part of the plaintiff to perform his part of contract. However, both the Courts below have considered this aspect of the matter to some extent. The contention of Shri Badhe, the learned counsel for the appellant, relying upon para 19 of the decision of the Apex Court in the case of *Makhan Lal Bangal v. Manas Bhunia and others*, reported in (2001) 2 SCC 652, is that it was obligatory on the part of the Trial Court to frame an issue as to readiness and willingness on the part of the plaintiff to perform his part of contract and failure to frame such an issue has caused prejudice, as the parties could not lead evidence in support of their rival stand. He submits that if a material proposition of fact is alleged in the plaint and denied, the Trial Court has to frame an issue and record its finding.

The proposition of law laid down by the Apex Court in the decision in the case of *Makhan Lal Bangal*, cited supra, cannot be disputed. Shri Badhe, the learned counsel for the appellant, has taken me through the written statement filed by the appellant-defendant. It is not disputed that the agreement was executed on 25-5-2001 for a total consideration of Rs.40,000/-, out of which, the substantial amount of Rs.30,000/- was paid by the plaintiff to the defendant and the balance remained only of Rs.10,000/-. The plaintiff had called upon the defendant by issuing a notice dated 10-6-2004 to execute the sale-deed by accepting the balance consideration. However, that has not been done and, therefore, the suit has been filed.

In this background, it is not the stand taken in the written statement that the plaintiff had no capacity to perform his part of contract or was not having sufficient funds to pay the balance amount of consideration. The willingness is also apparent from the notice at Exhibit 23 issued by the plaintiff. It was not the material proposition of fact disputed by the defendant that the plaintiff was not ready and willing to perform his part of contract. In view of this, non-framing of issue has not caused prejudice to the party concerned. The entire stand taken in the written statement in substance was about a loan transaction, which has

not been proved.

Thus, no substantial question of law arises for consideration.

The second appeal is dismissed.

Judge.

Lanjewar