

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.241 of 2015

(Smt. Suhasini w/o Dattatrayaa Nimgaonkar and another v. Shri Rajendra
s/o Atmarao Kamble)

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

Shri P.V. Vaidya, Advocate for Appellants.

Shri H.V. Thakur, Advocate for Respondent.

Coram : R.K. Deshpande, J.

Dated : 4th October, 2016

The Trial Court passed a decree for specific performance of contract, which has been confirmed in appeal by the lower Appellate Court. Hence, the original defendants are before this Court in this second appeal.

On 30-4-2015, this Court passed an order as under :

“ *Issue notice to the respondent on the substantial questions as formulated at Ground No.(a) and (b) of the memorandum of appeal returnable on 14.07.2015. Hamdast granted.*

Civil Application No.404 of 2015: Issue notice to the non applicant returnable on 14.07.2015. Till the returnable

date the execution of the impugned judgment shall remain stayed.”

The substantial questions of law formulated in Ground Nos.(a) and (b) of the memo of appeal are reproduced below :

“(a) Whether the courts below were right in holding that the respondent was ready and willing to perform his part of contract, in spite of the admission on his part in the cross examination, that he was not ready to pay the consideration as agreed?

(b) Whether the appellate court below was right in dismissing the appeal when the issue regarding the readiness and willingness was not framed and was held necessary to be framed?”

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. This aspect has been taken into consideration by the lower Appellate Court. In para 24 of its judgment, the lower Appellate Court has held that there is a specific averment about readiness and willingness made in paras 7 and 9 of the plaint, and even the evidence has been led by the plaintiff in support of his pleadings. In para 25, the lower Appellate Court has held that it was necessary for the Trial Court

to frame such an issue. However, the lower Appellate Court proceeds to consider the pleadings and evidence on record in paras 26 to 29 of its judgment, which are reproduced below :

*“26. **As to Point No.2 :** Though the issue in respect of Plaintiff's ready and willingness was not framed by the Court, it finds that Plaintiff Dr. Rajendra mentioned in his affidavit of examination in chief that he was and is ready and willing to perform his part of contract. His entire cross examination of all 3 dates is perused, it shows that it was revolving only on the point to show that he was not ready and willing to perform his part of contract. Even the specific suggestion that he was not ready to pay Rs.7,70,000/- to the Defendants for the flat was given to him and he admitted it in the cross examination taken on 5/12/2008. Further more in the cross examination dated 17/1/2009 he denied the suggestion that he was not ready to pay Rs.6,50,000/- and Rs.1,20,000/- and therefore the sale deed could not be executed. These suggestions specifically show that the cross examination was revolving on the point of Plaintiff's ready and willingness to perform his part of contract.”*

“27. Proceeding ahead, paragraph No.2 of the examination in chief of Defendant No.2 Mr. Vinay, shows that he mentioned in it that Plaintiff was not ready and willing to perform his part of contract and was not ready to pay Rs.5,00,000/- towards the balance consideration of the flats and therefore the sale deed could not be executed.”

“28. Moreover, the ending lines of paragraph No.16 and middle portion of paragraph No.17 of the Judgment of learned CJSD shows that he also concentrated and discussed on the point of Plaintiff's ready and willingness to perform his part of contract.”

“29. This entire discussion proves that even though there was mistake on the part of the Court in not framing the issue of ready and willingness of the Plaintiff to perform his part of contract, same controversy was taken in to consideration by all the parties during their respective evidence, cross examinations, and even by the learned CJSD while adjudicating the suit. Therefore, non framing of said issue will not vitiate the trial of the suit, nor it would be required to be remanded for said purpose and appeal can be heard and adjudicated on merits. Hence, there would not be adverse effect on it. Court accordingly records such finding to Point No.2 that its remand would not be necessary.”

There is a dispute as to whether an amount of Rs.1,20,000/- actually paid by the plaintiff to the defendants on 29-3-2003 was a part and parcel of the total consideration of Rs.6,50,000/-, which was agreed to be paid. According to the suggestion made by the defendants in the cross-examination, the total consideration agreed was of Rs.7,70,000/-, though in the written statement, a specific stand was taken that the total

consideration was of Rs.6,50,000/-, out of which, an amount of Rs.1,50,000/- was paid by the plaintiff. This controversy has been resolved by the Courts below, taking a possible view of the matter that an amount of Rs.1,20,000/- paid by the plaintiff on 29-3-2003 was not a part of the consideration, which was agreed.

The Courts below have held that the plaintiff has established his readiness and willingness to pay an amount of Rs.5,00,000/- towards the balance amount of consideration. It was the admission of the plaintiff in respect of amount of Rs.1,20,000/-, which, according to him, was a part of consideration paid. This is not accepted by the Courts below. The so-called admission was not the refusal to pay balance amount of Rs.5,00,000/-. After resolving the dispute between the parties on the question of payment of Rs.1,20,000/-, the Courts below have answered the issue in favour of the defendants with a direction to the plaintiff to pay an amount of Rs.1,20,000/- in addition to the balance consideration, as was agreed to be paid by the plaintiff. At any rate, the view taken by the Courts below is a possible view of the matter and none of the substantial questions of law arise for consideration by this Court.

The second appeal is dismissed.

At this stage, Shri Vaidya, the learned counsel for the appellants, submits that the appellants are in possession of the suit property and hence their possession be protected for a further period of six weeks. It is directed that the possession of the appellants shall not be disturbed for a period of six weeks from

today.

Lanjewar

Judge.

CERTIFICATE

“I certify that this Order uploaded is a true and correct copy of original signed Order.”

Uploaded by :
P.D. Lanjewar, PS

Uploaded on : 6-10-2016