

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 391 OF 2017**

Smt. Snehaprabha Bhagwan Chavan

... Appellant
(Orig. Plaintiff)

Vs.

Rameshchandra Gajanan Warde

... Respondent
(Orig. Defendant)*Mr. Dattatraya Godbole for the Appellant.**Mr. Drupad Patil for the Defendant.***CORAM: S. J. KATHAWALLA, J.****DATE: 7th September, 2017****P.C.:**

1. Special Civil Suit No. 6 of 2008 was filed by the Appellant - Smt. Snehaprabha Bhagwan Chavan ('Original Plaintiff') against the Respondent-- Rameshchandra Gajanan Warde ('Original Defendant') before the Civil Judge, Senior Division, Alibaug (the 'Trial Court') seeking specific performance of the Agreement for Sale dated 14th March, 2002, and in the alternative for refund of the earnest amount with interest. The Suit filed by the Plaintiff was decreed and the Respondent was directed to execute and register the sale deed in respect of the suit property by acceptinig the balance consideration amount from the Plaintiff, within a period of three months from the date of obtaining the

necessary permission of construction, getting the land measured and entering the name in the assessment record.

2. Being aggrieved, the Respondent- Original Defendant impugned the Judgment and Decree of the Trial Court dated 15th May, 2012 by filing an Appeal being Civil Appeal No. 262 of 2012 before the Principal District Judge at Raigad (Appellate Court). The Appellate Court by its Judgment and Decree dated 17th October, 2016, allowed the Appeal, the relief granted for specific performance was set aside and the Defendant was directed to refund the earnest money of Rs. 50,000/- received from the Plaintiff along with interest at the rate of 8 per cent per annum from the date of filing of the suit till realisation.

3. Being aggrieved by the Judgment and Decree of the Appellate Court dated 17th October, 2016, the Appellant - Original Plaintiff has filed the above Second Appeal before this Court under Section 100 of the Code of Civil Procedure, 1908.

4. For the sake of convenience, the Appellant and the Respondent are referred to hereinafter as per their original status as Plaintiff and Defendant respectively.

5. According to the Plaintiff, by virtue of a registered Sale Deed dated 12th October, 1983, the Defendant is the owner of a plot admeasuring 30 metres in

length and 23 meters in width, situated at village Bagdanda, Tal. Alibaug, Dist. Raigad (the 'Suit property'). Since the Plaintiff learnt that the Defendant was willing to sell the Suit property, the Plaintiff entered into an Agreement for Sale dated 14th March, 2002 with the Defendant, whereunder the Plaintiff agreed to purchase and the Defendant agreed to sell the Suit property for a consideration of Rs. 6,25,000/-. The Plaintiff paid Rs. 50,000/- as earnest amount on the date of entering into the Agreement for Sale.

6. According to the Plaintiff, as per the terms of the said Agreement, it was incumbent upon the Defendant to obtain permission to construct a house on the Suit property. The Defendant, without obtaining fresh permission in pursuance of the Agreement, relied on the permission which he had earlier obtained in the year 1987 and which had lapsed after a period of one year. According to the Plaintiff, she had published notice in the local newspaper dated 30th January, 2003 inviting objections. Thereafter the Defendant addressed a Notice dated 1st December, 2003 to the Plaintiff which was replied by the Plaintiff vide Letter dated 9th December, 2003. During the period 2003 and 2006, the Plaintiff on several occasions persuaded the Defendant to execute the final conveyance. On 29th May, 2007, the Plaintiff addressed a legal notice to the Defendant demanding specific performance but the same was not replied to by the

Defendant. On 30th December, 2007, the Defendant published notice in local newspaper i.e. Raigad Times which showed that the Defendant was to enter into a fresh agreement to sell the Suit property with a third party. The Plaintiff therefore filed the suit seeking specific performance of the contract and in the alternative sought refund of earnest amount of Rs.50,000/- with interest at the rate of 21 per cent per annum.

7. The Defendant contested the suit by filing his written statement (Exh.17) and denied all the allegations made by the Plaintiff against the Defendant. The Defendant contended that the suit is barred by the law of limitation and the Plaintiff had not specifically averred her readiness and willingness to perform her part of the contract as contemplated under Section 16 (c) of the Specific Relief Act. The Defendant admitted that there was an Agreement for Sale dated 14th March, 2002 between the parties for a consideration of Rs. 6,25,000/- and the Defendant had received Rs. 50,000/- towards earnest money. The Defendant contended that the Plaintiff has wrongly mentioned the western boundary of the Suit property. The Defendant denied that there was a condition in the Agreement for Sale that the Defendant shall obtain permission to carry out construction on the Suit plot. According to the Defendant, since the Plaintiff failed to execute the registered sale deed, the Defendant vide Notice dated 1st

December, 2003, informed the Plaintiff that time was of the essence of the contract. However, since the Plaintiff failed to take effective steps, the Defendant is justified in proceeding to dispose of the Suit property as per his choice. According to the Defendant, the Plaintiff is neither entitled to specific performance of the Agreement for sale nor to receive refund of earnest money, and hence the suit deserves to be dismissed.

8. The Trial Court framed issues and by its Judgment and Decree dated 15th May, 2012 held that though it was agreed under the Agreement for Sale dated 14th March, 2002, that the registered sale deed was to be executed within a period of six months from the date of execution of the Agreement for Sale dated 14th March, 2002, the Defendant failed to obtain permission for construction of the house on the Suit property and to also get the land measured as agreed in the Agreement for Sale; therefore, unless the Defendant complied with the said conditions, there cannot be any question of execution of a registered sale deed between the parties ; the Defendant having failed to comply with his obligations as agreed under the Agreement for Sale, cannot blame the Plaintiff for not performing her part of the contract ; the period to execute the final conveyance therefore automatically got extended from time to time and the prescribed time limit of six months would start running against the Plaintiff only after the

Defendant obtained the permission to carry out the construction on the Suit property; the Suit is therefore not barred by the provisions of the Limitation Act. The Trial Court in its Judgment and Decree also recorded that the Counsel for the Defendant has argued before the Court that from the reply letter / notice dated 9th December, 2003 issued by the Plaintiff to the Defendant, it is evident that the Plaintiff is demanding refund of earnest amount and thereby intends to forgo or close the transaction. However, the Trial Court has not accepted this argument advanced on behalf of the Defendant and has taken the view that the said notice should be read in its entirety and the Plaintiff has only with a view to deny the allegation of his non-readiness and non-willingness, stated in the said reply letter / notice that in the event of cancellation of agreement, the Defendant ought to have refunded the earnest money. Therefore it cannot be inferred that the Plaintiff has expressed her intention to forgo the transaction. The Trial Court therefore decreed the suit and directed the Defendant to obtain necessary permission, carry out the measurements as agreed under the Agreement for Sale and execute the sale deed in respect of the Suit property in favour of the Plaintiff by accepting the balance consideration.

9. As set out hereinabove, being aggrieved by the Judgment and Decree passed by the Trial Court, the Defendant filed an Appeal being Regular Civil

Appeal No. 262 of 2012 before the Principal District Judge at Raigad. The Appellate Court by its detailed judgment has modified the decree and has set aside the relief of specific performance granted by the Trial Court in favour of the Plaintiff and has instead directed the Defendant to refund the amount to the Plaintiff with interest at the rate of 8 per cent per annum from the date of filing of the suit till realisation.

10. The Appellate Court has in its Judgment and Decree dated 17th October, 2016 recorded the following terms of the Agreement for Sale dated 14th March, 2002 (Exh. 30) :

- “(a) The amount of Rs. 50,000/- was paid as earnest money.*
- (b) House was to be constructed in the suit property for which permission was to be obtained in the name of the Defendant and thereafter only sale deed was to be executed.*
- (c) The Plaintiff has to incur the expenses for construction of the house and the defendant would give consent, swear affidavit, make signature wherever necessary and obtain permission for construction and thereafter would execute the sale deed.*
- (d) The defendant shall get the land measured at his own costs.*
- (e) The sale deed was to be executed within a period of six months from the date of agreement of sale.”*

The Appellate Court has thereafter reproduced Article 54 of the Limitation Act and has explained that as per the said Article if a date is fixed for the performance of an agreement / contract, the period of limitation would be three years from the date so fixed, and where no such date is fixed, the period of

limitation would be three years from the plaintiff having notice that performance is refused. The Appellate Court has pointed out that from the terms of the agreement it is evident that the Defendant was to obtain the permission for construction and also get the land measured ; only if these two conditions were satisfied, the sale deed was to be executed within a period of six months ; however, admittedly, the Defendant did not apply for permission for construction nor did he get the land measured ; the Plaintiff has produced the notice issued to her by the Defendant dated 1st December, 2003 in which the Defendant has relied on the permission to construct on the Suit property, obtained by him **in the year 1987** which had admittedly lapsed after a period of one year, and had in the said notice taken a stand that no fresh permission is needed for constructing the house in the suit property ; he further informed the Plaintiff by the said notice that the wire fencing is already done on the suit property admeasuring 30 mtrs. X 23 mtrs. and wooden poles have been installed and **on his part nothing is left to be performed**; therefore this goes to show that the Defendant clearly refused to perform his part of the contract and also stated in his letter/notice that he is ready to execute the sale deed within a period of 15 days from the date of the said notice ; that in view of the offer to execute the sale deed within 15 days from the date of the said notice it cannot

be concluded that there was no refusal on the part of the Defendant, who has only shown his intention to execute the sale deed but at the same time informed the Plaintiff that from his side nothing is left to be done, therefore, the notice dated 1st December, 2003 clearly indicates the Defendant's refusal to perform his part of the contract and therefore the suit ought to have been filed within a period of three years from 9th December, 2003, but the same is filed 5 years thereafter i.e. on 26th September, 2008 and the suit is therefore barred by limitation ; that even if it is assumed for the sake of argument that there was no refusal on the part of the Defendant to execute the sale deed, the law does not expect the parties to wait for long periods of time, and it cannot be said that the Plaintiff has filed the suit within a reasonable period.

11. As regards the issue pertaining to the readiness and willingness on the part of the Plaintiff to perform her part of the Agreement / contract as stated earlier, the Trial Court in paragraph 13 of its Order has recorded the submissions of the Defendant, that from the reply notice dated 9th December, 2013 issued by the Plaintiff, it is evident that the Plaintiff is demanding refund of earnest money and thereby intending to forego or close the transaction. The Trial Court has rejected this submission advanced on the part of the Respondent. The reason given by the Trial Court whilst rejecting the above submission of the Defendant

is reproduced by the Appellate Court in paragraph 26 of its Order as follows :

"However, it is to be noted that said notice shall have to be read in entirety and one cannot be permitted to pick and choose any particular statement in isolation. It seems that the Plaintiff with a view to deny the allegations of his non readiness and non willingness has stated that in the event of cancellation of agreement the Defendant ought to have refund earnest amount. Therefore, it cannot be inferred that the Plaintiff had expressed his intention to forgo the transaction. As a matter of fact, if the notice is read in entirety, it disclosed the fraud played by Defendant by way of submitting old permission of construction and further demanding from Defendant specific performance of contract. When the Plaintiff averred his readiness and willingness, that by itself is sufficient to disclose his capability to perform his part of contract, unless contrary is proved."

12. The Appellate Court has thereafter held that though it is true that the Plaintiff has alleged that the Defendant perpetrated a fraud on her, the same does not come to her aid and she has failed to establish her readiness and willingness to perform the contract. The Appellate Court has therefore set aside the decree passed by the Trial Court granting specific performance in favour of the Plaintiff and instead directed the Defendant to return the earnest money with interest @ 8% p.a. to the Plaintiff from the date of filing of the Suit till realization of the entire amount.

13. Being aggrieved by the Judgment and Decree passed by the Appellate Court, as stated earlier, the Appellant filed the above Second Appeal. The Learned Advocate appearing for the Appellant once again submitted that the Appellant was at all relevant times ready and willing to perform the contract and has not closed the transaction by her letter dated 9th December, 2003 and the Suit filed by the Appellant is within time.

14. I have gone through the letter dated 9th December, 2003 addressed by the Plaintiff to the Defendant (Exh. 33), which was produced before the Courts below. In the second last paragraph of the said letter, the Plaintiff has recorded that till date the Defendant has not complied with both the conditions set out in the agreement (i.e. obtaining fresh permission for construction and getting the suit property measured) and instead the Defendant is repeatedly showing her the permission dated 23rd December, 1987 which has lapsed, and is calling upon her to pay the balance amount and execute the sale deed, which shows that his motive is to commit a fraud on the Plaintiff. She has further stated that the Defendant is trying to defraud her by blocking her earnest money amount of Rs. 50,000/- and trying to sell the property to someone else. She has therefore informed the Defendant that she will be filing appropriate complaint with the police authorities against him. She has further stated that

since she has suffered loss / damage, the Defendant should forthwith return her amount of Rs. 50,000/- along with interest and if the said amount along with interest is not paid to her forthwith, she will commence appropriate proceedings against the Defendant at his cost and the Defendant will not be able to sell the suit property without her consent.

15. In *N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao*¹ at para 5, the Hon'ble Supreme Court has held as under:

*“.... Section 16 (c) of the Act envisages that the Plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the Defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the Plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. **Right from the date of the execution till date of the***

¹ (1995) 5 SCC 115

decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract." (Emphasis supplied)

16. The Hon'ble Supreme Court has reproduced the above findings in its later decision i.e. in the case of ***J.P. Builders vs. A. Ramadas Rao***².

17. The Division Bench of the Madras High Court has given its similar findings in the case of ***K.S.Sundaramayyar, Appellant v. K. Iagadeesan and another, Respondents***³. In that case, the first respondent therein by registered notice dated 17th May, 1958 sent to the appellant had accused the appellant, of having failed to perform the contract and claimed that he would be entitled to forfeit the advance of Rs.4,000/- paid to him, and further stated that the appellant would be liable to recoup any loss he might sustain by sale of the property to a third party. The Advocate for the appellant by his reply letter / notice dated 22nd May, 1958 after making several allegations qua the first respondent not having performed his obligations in the contract inter alia

² (2011) 1 SCC 429

³ AIR 1965 MADRAS 85

recorded as under :

"As there was no offer even in the telegram to deliver possession to my Client of the property as per the terms of agreement, my client was not bound to finish the sale deed as stated in the telegram. You have thus committed default and broken the terms of the agreement. My client has been ever ready and willing to act upto the terms .. to the property by giving the title deeds for my client's inspection and by handing over possession to my client of the portion in your occupation, you are bound to return the sum of Rs.4,000/- received by you as advance and also pay my client Rs.4,000/- by way of damages.

You are therefore hereby called upon to pay my client the sum of Rs.4,000/- received as advance and also Rs.4,000/- by way of damages within 3 days of receipt of this notice. Take notice that on default of compliance with this demand, steps will be taken through Court for recovery of the said sums. "

The Division Bench of the Madras High Court after reproducing the above quoted portion in its order held as follows :

"Even assuming that time was not the essence of the contract and that the first Respondent was guilty of breach, it is clear from the above letter that the Appellant had decided not to keep the contract subsisting but on the other hand, had put an end to it and demanded damages for an alleged breach by the first Respondent. Such a demand for return of the advance paid is quite inconsistent with the subsistence of the contract. It cannot be said therefore that the Appellant was ready and

willing to perform his part of the contract. "

The Division Bench of the Madras High Court has thereafter noted that 03 days later the first respondent wrote a letter to the Appellant therein setting out his version of the case and reiterating the original decision for forfeiting the advance amount and claiming further damages. In response, the appellant by his letter dated 10th June, 1958 reiterated the stand taken by him in his notice dated 22nd May, 1958 and called upon the first respondent therein to comply with the demands made in the notice. It is further noted by the Division Bench of the Madras High Court that about six months thereafter, the appellant completely changed his case and issued notice through his Advocate to the first respondent claiming specific performance of the contract by the first respondent within 03 days therefrom, after receiving the balance of the sale price. The appellant claimed that he was always ready with the sale price and he withdrew the notice that he had given seeking refund of the advance and compensation money, as he was advised that he can obtain specific performance itself. The Division Bench of the Madras High Court thereupon proceeded to hold as follows :

"This statement itself amounts to an admission that by the previous notice the Appellant had put an end to the contract by claiming a return of the advance amount paid by him. It will not be open to a party to a contract, who has once elected to accept the breach assuming

*there was a breach on the part of the other side to cancel that election and treat the contract as if it were subsisting. We regard the notice dated 22nd May, 1958 as amounting to a definite abandonment by the Appellant of his right to obtain specific performance of the contract. As pointed out by the Privy Council in **Ardeshir Mama v. Flora Sasson, ILR 52 Bom 597**⁴, the Plaintiff in a Suit for specific performance should always treat the contract as still subsisting, he has to prove his continuous readiness and willingness, from the date of the contract to the time of the hearing of the Suit, to perform his part of the contract and a failure to make good that case would undoubtedly lead to a rejection of his claim for specific performance. Where, therefore, a party to a contract of sale made a claim for damages, on the footing of its breach by the other party it would amount to a definite election on his part to treat the contract as at an end and thereafter no Suit for specific performance could be maintained by him, for, by such election, he had disabled himself from making the averment that he had always been ready and willing to perform his part of the contract.*

Learned Counsel for the Appellant, however, contended that so long as the injured party had not chosen his remedy and obtained satisfaction for the breach of the contract by the other party, specific performance could be granted. He relied in this connection on Section 24(c) of the Specific Relief Act. But the question in the present case is not whether the Appellant had not availed himself of one remedy or another, it is even more fundamental than that. The

⁴AIR 1928 PC 208

Appellant had as we said put an end to the contract and demanded a return of the advance amount paid by him and made a further claim for damages. If the contract were to be held as subsisting, he would have no right to insist upon a return of the advance amount. We are unable to find anything in the decision in Calcutta Improvement Trust v. Surbarnabala Debi, 44 Cal WN 541 to support the contention that notwithstanding the election by a party to a contract to accept the breach by another, he could still revive, at his choice, the contract and insist upon a specific performance thereof."

18. In the present case, the Plaintiff by her letter dated 9th December, 2003 addressed to the Defendant has in specific terms recorded that the motive of the Defendant is to commit a fraud on the Plaintiff; that he is trying to defraud the Plaintiff by blocking her earnest money of Rs.50,000/- and trying to sell the Suit property to someone else; that she has suffered loss / damage and the Defendant should forthwith return her amount of Rs.50,000/- along with interest; that if the Defendant fails to pay the said earnest money / deposit along with interest; she will commence appropriate proceedings against the Defendant at his costs, and the Defendant will not be able to sell the Suit property without her consent, which clearly establishes beyond doubt that the Plaintiff was no longer ready and willing to perform/proceed with the Agreement for Sale. Since the Plaintiff on the day she wrote the letter to the Defendant i.e. 9th December,

2003 was not ready and willing to perform her part of the contract, which she is required to do right from the date of execution of the Agreement till the date of decree as held by the Hon'ble Supreme Court, it certainly cannot be said that the Plaintiff was at all relevant times, ready and willing to perform her part of the contract and is therefore entitled to a decree of specific performance of the Agreement against the Defendant. Though the Appellate Court is also correct in holding that the Plaintiff has filed the Suit five years after it was made clear to her by the Defendant that he is not willing to perform his part of the contract and the Suit is barred by the Law of Limitation, the Plaintiff is not entitled to the relief of specific performance only on the ground that the Plaintiff was not ready and willing to perform / proceed with the Agreement for Sale. Therefore, in my view, no substantial question of law arises in the above Second Appeal and the same is dismissed.

(S.J. KATHAWALLA, J.)