

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

SECOND APPEAL NO. 566 OF 2014

WITH

CIVIL APPLICATION NO. 1387 OF 2014

IN

SECOND APPEAL NO. 566 OF 2014

Fedrick Shantwan Dalbhanjan & Anr. ...Appellants

Versus

Alfred Samuel Christie & Ors. ...Respondents

Ms. Manjiri Parasnis, for the Appellants.

Mr. Rajesh More, for the Respondent No. 2.

Mr. Rampal Kohli, a/w Mohammed Ashraf, i/b Vikram Chavan,
for Respondent No. 3.

CORAM : N.M. JAMDAR, J.

DATE : 6 April 2017

ORAL ORDER :

1. By this Appeal, the Appellants have challenged the judgment and order passed by the learned Civil Judge, Pune

dated 20 March 2007 and the order passed by the learned District Judge, Pune dated 27 August 2014. By the impugned orders, the Suit filed by the Appellants-Plaintiffs was allowed only to the extent of refund of earnest amount and the decree for specific performance was refused.

2. The Appellants filed the Special Civil Suit No. 956 of 1995 seeking specific performance of the agreement dated 21 October 1992. According to the Appellants, the parties had agreed for sale of a flat. According to the Plaintiffs, consideration of Rs. 1,50,000/- was agreed. It was agreed that the Appellants would pay the balance consideration on or before 1 May 1993 and the agreement would be executed. The Appellants gave two notices on 20 March 1993 and 20 April 1993. Since the Respondents did not execute the agreement, the Suit was filed. The learned Civil Judge framed issues as regard the genuineness of the agreement dated 21 October 1992 as to whether it was executed by misrepresentation, fraud and undue influence, whether the Appellants were ready and willing to perform as part of the contract. The learned Civil Judge held that the agreement was not executed by undue influence or misrepresentation. However, it was held that the Appellants were not entitled to specific performance since the Appellants were not ready and willing to perform his part of the contract. In the Appeal filed by the Appellants, the learned District Judge

confirmed the order. Both the Courts therefore, have concurrently held that the Appellants were not ready and willing to perform the part of the contract.

3. The learned Counsel for the Appellants submitted that the Appellants have made categorical statement that the Appellants were ready and willing to perform the part of the contract and that had even made an offer to deposit the money in the Court. It was submitted that the Appellants had applied for loan to the bank and because of the communication of the Respondents to the co-operative society, permission was not granted and in view of this position, the Appellants had to cancel the loan application on 11 August 1993. The learned Counsel relied on the decisions in case of *M/s. Avdel Tools & Services Vs. M/s. Trufit Fasteners Pvt.Ltd.*¹ and *Narinderjit Singh Vs. North Star Estate Promoters Limited*².

It is submitted that it is not necessary that the Plaintiffs must demonstrate that the actual amount with him so as to show readiness and willingness. It was also contended that having held that the agreement was not executed by undue influence and fraud, the learned District Judge could not have held that the agreement was executed in the circumstance which are suspicious. The learned Counsel for the Respondents

¹ 2008(6) ALL MR 611

² (2012)5 SCC 712

relied upon the terms of the agreement and pointed out that the time was essence of the contract and it was mandatory on the Appellants to pay the balance amount on or before 1 May 1993 and no such stand by the Appellants is taken through any communication that on that relevant date the Appellants was ready.

4. In the present case, clauses 8 and 9 of the agreement are material to be noticed and are reproduced as under :-

“8) It is specifically agreed that the Purchasers shall pay the balance amount on or before 1st May, 1993 and simultaneously the Vendor shall execute the final Deed of Conveyance for the effective transfer of the said flat in the name of the Purchasers on or before 1st May, 1993 when the Purchasers shall make the payment of the balance amount.

9) The Vendor shall handover vacant possession of the said flat on or before 1st May, 1993 on the purchasers making the payment of balance amount of Rs. 1,40,000/- (Rs. One Lac Forty Thousand only) and shall not delay in handing over of the possession for any reason.”

These clauses clearly stipulates the amount has to be paid by 1 May 1993.

5. As far as the Application of the Appellants to the bank is concerned, that is for the Appellants for the purpose of raising money and it has nothing to do with the obligation of the Appellants to pay the balance amount on or before 1 May 1993. The crucial date was 1 May 1993. Though the learned Counsel for the Appellants submitted that the letters were issued to the Respondents calling upon them to execute the agreement and the Appellants are ready to perform the part of the contract, there was no indication in the communication that the Appellants had called upon the Respondents to accept the amount, at that time. Nothing has been shown as to how the Appellants have access to fund, since loan was applied for and then cancelled.

6. The Application made by the Appellants to the bank was pending and the reason why the Appellants could not raise money from the bank, is irrelevant as far as the agreement is concerned. Subsequently, the Appellants cancelled the loan agreement. The learned District Judge has rightly held that the question taking permission of the co-operative society can arise only after the agreement would be registered.

7. Thus, the findings of fact recorded by both the Courts that as on 1 May 1993 the Appellants did not lead any cogent evidence regarding his readiness and willingness in all respects, more particularly, to pay the balance amount, cannot be faulted with. Though it is not necessary that the Plaintiffs must prove that the Plaintiffs had actual money with him, the readiness and willingness of a purchaser remains a condition precedent for grant of relief and this condition precedent is not diluted in any manner. The question of readiness and willingness is also of finding of fact. In absence of any express offer on the part of the Appellants to pay the balance amount as on 1 May 1993, the findings reached by the learned District Judge that the Appellants were not ready and willing, is a possible view of the matter. It is not possible to re-appreciate the evidence. No substantial question of law arises in this Second Appeal. The Second Appeal is accordingly, dismissed.

8. At this stage, the learned Counsel for the Appellants seeks continuation of an ad-interim relief. Considering the above, continuation of an ad-interim relief refused. In any case, the specific Reliefs Act, 1963 provides adequate remedy in case of creation of third party rights.

[N.M. JAMDAR, J.]