

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

**APPEAL FROM ORDER NO. 636 OF 2017
WITH
CIVIL APPLICATION NO. 801 OF 2017
IN
APPEAL FROM ORDER NO. 636 OF 2017**

Shri Ganesh Tukaram Datir ...Appellant

Versus

Ramchandra Savaliram Datir ...Respondent

.....
Mr.Prashant D. Patil for the Appellant.

.....

**CORAM: MRS.MRIDULA BHATKAR, J.
DATE : DECEMBER 18, 2017**

P.C.:

1. This Appeal from Order is directed against the order of remand dated 31st August, 2016 passed by the learned Ad-hoc District Judge-1, Nashik in Regular Civil Appeal No. 59 of 2016.

2. The appellant/plaintiff has filed Special Civil Suit No. 21 of 2013 for specific performance against the defendant/ respondent. The consideration agreed for purchase of the land was Rs. 38 lakhs. The Agreement of Sale was executed between the parties on 26th May, 2010. On that day, the respondent/defendant had accepted an amount of Rs. 1 lakh from the appellant/plaintiff. However, the

respondent/defendant has denied that it was an agreement for sale and purchase of the land, but it was only for the purpose of raising loan security or offer. The Suit was decreed by the judgment and order dated 6th May, 2015 passed by learned Judge of the trial Court against which the respondent/defendant preferred Regular Civil Appeal No. 59 of 2016. In the Appeal, it was noticed that though the Suit was for specific performance, the trial Court did not frame issue on the point of readiness and willingness of the plaintiff to pay the amount. The trial Court remanded back the matter to the Appellate Court. Thus, the Appellate Court framed the issue as follows:

“Does plaintiff prove that he is ready and willing to perform his part of contract?”

The Appellate Court remanded back the matter to the trial Court and directed to give a finding on this issue and send the proceeding again to the Appellate Court within a period of two months from the date of the order. Hence, this Appeal.

3. Learned counsel for the appellant has submitted that the appellant had deposited an amount of Rs. 37 lakhs in the trial Court and that amount is still there. He has further submitted that the trial Court has decided all the issues in favour of the appellant/plaintiff

and hence, the suit is decreed. Under such circumstances, the order of remand passed by the Appellate Court is illegal and is to be set aside. It will cause prejudice to the plaintiff, as he is prosecuting the matter since 2013.

4. The respondent has filed Caveat, however, none present for the respondent.

5. It appears from the record that earlier this Appeal was dismissed for non-compliance of the conditional order dated 23rd June, 2017 passed by this Court. The application was made for restoration of the Appeal. By order dated 21st August, 2017 passed by this Court, the Appeal was restored. At that time, the respondent was represented by counsel and in the presence of the counsel for both the sides, Appeal was placed for admission on 13th November, 2017. Thereafter, by consent of the learned counsel for both the parties, the matter was fixed on today, however, none present for the respondent.

6. Perused the impugned judgment and order passed by the trial Court and also the order of remand passed by the Appellate Court. On perusal of the issue framed by the Appellate Court, it is found that

the trial Court failed to frame the issue on the point of readiness and willingness on the part of the plaintiff. It is a suit for specific performance and, therefore, the party claiming the performance has to show his readiness and willingness to perform his or her obligations of the contract. The Appellate Court has taken a correct view. I do not find any good ground to set aside the order passed by the Appellate Court.

7. I am informed that the matter is already remanded back to the trial Court and parties are appeared before the trial Court.

8. In view of this, the parties are directed to appear before the trial Court on 10th January, 2018 and the trial Court to proceed with the matter as per the order of the Appellate Court.

9. With this, Appeal from Order is disposed of. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)