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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 363 OF 2018
WITH
CIVIL APPLICATION No. 839 OF 2018

Banvirsingh Motiram Punjabi ... Appellant
Vs.
Gopinath K. Vidhate & Anr. ... Respondents

Mr. Milind M. Sathaye, for the Appellant.

CORAM : A. M. DHAVALA, J.
DATE : SEPTEMBER 12, 2018

PC :-

1. Heard the learned advocate Mr. Milind Sathe for the Appellant. By an agreement dated 23rd January, 1996 Defendant No. 1 had agreed to sale his land of 52 R to the plaintiff for Rs.11,20,000/-. Earnest money of Rs. 2,50,000/- and cheque of Rs. 1,00,000/- for payment of loan was given to the plaintiff at the time of agreement. The agreement shows that Defendant No. 1 was in financial crunches. It stipulates that within three months, the plaintiff would pay 33% of the

balance money amount and the sale-deed was to be obtained within six months. On 21st April, 1996, the plaintiff published a public notice calling objections and as one Sanjay Nikam raised objection, the plaintiff did not pay 33% of the amount. As per the plaint, said amount was withheld for non submission of some documents. It appears that the plaintiff was very much in doubt about the title of defendant No. 1. On 10th June, 1996 plaintiff issued notice to defendant No. 1 (Exhibit 66). In this notice, it was recorded that plaintiff told defendant No. 1 and others that they were cheating him and they should refund his amount and he wanted to cancel the agreement. Then, he was given assurance that the agreement with Sanjay Nikam would be cancelled and the defendant would clear the title. It was given in writing. Then by the said notice, in the last paragraph, the plaintiff called upon defendant No. 1 to clear doubts about the issue of title and give in writing that he would act as per the terms and conditions of agreement to sale. If no such writing was given, he would take action against the defendant for

cheating and breach of trust and appropriate proceeding would be initiated in the civil, criminal and the consumer courts.

2. Thereafter one another notice 3rd July, 1996 was issued in which the plaintiff showed readiness and willingness to perform his part of the contract. On 1.7.1996 another notice was issued by the plaintiff to defendant No. 1. Again, it was reiterated that defendant No. 1 and others have cheated him by concealing the transaction with Sanjay Nikam, and thereby committed offence under S. 420 I.P.C. There was assurance given that the obstructions of Sanjay Nikam's would be cleared. Relying on the same, the plaintiff had continued with the agreement. The plaintiff intimated that he was always ready and willing to perform his part of the contract. But again threatened with action in civil, criminal and consumer courts while demanding execution of sale-deed. Meanwhile, three more public notices were issued on behalf of the objectionists. The plaintiff filed suit on 10th September, 1996. Defendant No. 1 had filed written-statement and cross-examined the

plaintiff, but did not lead evidence. Suit was proceeded exparte against other defendants. Defendant No. 1 claimed that the Defendant Nos. 2 and 3 colluded with and obtained his signature by fraud. Learned trial court answered all points in favour of the plaintiff, except the point of readiness and willingness. The suit was partly decreed to the extent of refund of money with interest @ 12% per annum. Being aggrieved, plaintiff preferred Appeal No. 330 of 2015 in the Court of District Judge, Nashik. Though the appeal is stated to be partly allowed, the operative part of the judgment disclose that the decree of the trial court was confirmed. Both the lower courts have relied on plaintiff's notice dated 10th June, 1996 to hold that the plaintiff was not ready and willing to perform part of his contract.

3. Learned advocate Mr. Sathe submitted that normal rule is that time is not essence of the contract in specific performance of agreement relating to immovable property. The plaintiff has paid huge amount at the time of agreement and he

was ready and willing but there were objections raised by the third party. Defendant No. 1 in personal contacts assured to clear the objections, raised by the third party. Thereafter the two notices are issued within stipulated period of six months and the suit is filed within reasonable time. In notice dated 1st July, 1996 readiness and willingness to pay the entire amount was expressed. Both the courts below erred in not considering material in proper perspective and has wrongly interpreted the notice of the plaintiff dated 10th June, 1996. He relied on judgment of the Apex Court in **Motilal Jain Vs. Smt. Ramdasi Devi & Ors.**¹ to submit that readiness and willingness is not required to be expressed in specific phraseology of language. The expression of intention in different words will not disclose that plaintiff was not ready and willing to perform his obligation. **Pandurang Ganpat Tanawade Vs. Ganpat Bhairu Kadam**². The averment of plaintiff shows that the plaintiff sent notices to the seller to execute sale-deed and he was ready and

1 AIR 2000 SC 2408

2 AIR 1997 SC 463

willing to pay consideration amount with requisite fees for sale-deed, cost of registration and balance amount as per agreement. It should be treated as sufficient evidence, pleading and proof of readiness and willingness to perform his part of the contract.

4. In **Hariba Babu Babar & Anr. Vs. Appasaheb D. Nagargoje**³ it is held that readiness and willingness is a question of fact. It is also held that, if the averments in plaint as a whole indicate the readiness and willingness of the plaintiff to fulfill his part of the obligation under the agreement in question, then mere fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in suit for specific performance of contract for sale. One has to see the pith and substance of the plea. Preference has to be given to the substance and not to a mere format.

5. When there are concurrent findings of both the courts below, there is little scope for this Court to invoke jurisdiction under S. 100 C.P.C. and interfere with the findings. Except in cases where the material evidence has been ignored or

3 2007 (5) Mh.L.J. 260

that inadmissible evidence has been considered or the finding is based on no evidence, or there is perversity or that the settled principles have not been applied.

6. In the light of the arguments advanced, I find that there is no specific averment in the present case that time was not essence of the contract. In fact, the plaint shows that plaintiff was ready and willingness to perform contract as per the terms and conditions of the agreement. The contract shows that the seller was in financial crunches and specific time limits were fixed that 33% of the balance amount was to be paid within three months and the balance amount was to be paid within six months from the date of agreement dated 23.1.1996. The evidence recorded by the trial court disclose that the plaintiff was not having that much amount. He wanted to raise by selling his land. The evidence shows that 33% of the balance money payable on or before 23rd April, 1996 was not paid at any time and no specific explanation was given by him. The plaint, on the contrary, shows that the plaintiff has refused to pay the

balance in view of the doubts of title of the defendant. When the plaintiff received objections from Sanjay Nikam, he did not call upon defendant No. 1 to clear the doubts and execute the sale-deed as per the terms and conditions of the agreement. He did not show readiness and willingness to pay the amount subject to removal of objections of Sanjay Nikam in his notice dated 10.6.1996. On reading of both the notices dated 10.6.1996 and 1.7.1996, it is seen that plaintiff was not certain about the clear title of defendant No. 1, and therefore, he had withheld the amount. The evidence shows that he was not having the amount. In his notice, he did not say about non-payment of the amount payable after three months. If the plaintiff has deliberately withheld the amount and was not speaking as to the removal of objection, the finding recorded by both the courts below cannot be said to be perverse or based on no evidence or on consideration of inadmissible evidence. Whether notices of the plaintiff can be interpreted in different manner, is not a point to be considered, at this stage. I cannot

consider it what I would have done if I would have been trial court or the first appellate court. When there are concurrent findings, there is little scope to formulate substantial question of law on the issue, basically based on facts. I find that no substantial question of law has been raised in the present matter. Therefore, the appeal cannot be admitted. Hence, appeal is dismissed in *limine*.

7. Pending civil application filed in this appeal does not survive and is accordingly disposed of.

Sd/-
[A. M. DHAVALA, J.]

Vinayak Halemath