

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

**SECOND APPEAL NO.202 OF 2019
WITH
CIVIL APPLICATION NO. 146 OF 2019**

Kedar Rajak
Age: 46 years, Occu: Business,
R/at: Flat No.102, Aksha Co-op.
Housing Society Ltd., Plot No.5657,
Sector-44A, Nerul, Navi Mumbai,
Dist. Thane

... Appellant
(Orig. Defendant)

Versus

Gurudas Parshuram Nakhwa
Age: 41 years, Occu: Business,
R/at: Karanja - Babdevpada,
Taluka - Uran, District - Raigad.

... Respondent
(Orig. Plaintiff)

.....

Mr. Girish R. Agrawal for the Appellant.
Mrs. A.R.S. Baxi i/b S.H. Bohra for the Respondent.

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CORAM : SANDEEP K. SHINDE, J.

RESERVED ON : 7th MARCH, 2019

PRONOUNCED ON : 15th MARCH, 2019

ORAL JUDGMENT :

1. Appellant-original defendant seeks admission of this second appeal on the following substantial questions of law;

(i) The findings recorded by the Trial and First appellate Courts, that the plaintiff was ready and willing to perform his part of the contract being inconsistent with the

evidence and perverse, whether the decree for the specific performance granted by the Courts is sustainable?

(ii) Whether plaintiff has satisfied and established the ingredients of Section 16(c) for the Specific Relief Act, 1963.

2. Whether the suit was barred by limitation; whether the plaintiff is guilty of negligence or laches, which by and large may not be questions of law of general importance, but then cannot also be considered to be pure questions of facts based on appreciation of evidence as held by the Hon'ble Apex Court in the case of B. K. Sri Harsha (D) By L.R. & Anr. Vs. M/s. Bharath Heavy Electricals Ltd. reported in AIR 2008 SC 1267.

3. In this appeal the appellant essentially has raised the issue as to whether the plaintiff has satisfied the requirements of Section 16(c) of the Specific Relief Act, 1963.

4. With the consent of parties, the appeal is taken up for hearing at the admission stage.

5. Heard learned Counsel for the parties. Perused the paper-book.

6. In the case of Motilal Jain Vs. Ramdasi Devi reported in AIR 2000 SC 2408, the Hon'ble Apex Court held thus;

“An averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale.”

7. Herein, agreement to sell (suit contract agreement) was executed by the appellant-defendant on 3rd September, 2010, whereby the appellant had agreed to sell flat No.102 at Nerul, Navi Mumbai to the plaintiff-purchaser upon certain terms and conditions. Agreement was registered with the Sub-Registrar and Index-2 shows its market value was Rs.36,76,500/-; however stamp duty was paid on value of Rs.30,00,000/-. In terms of this agreement, Rs.5,00,000/- were paid on execution of it and balance consideration was payable upon handing over of vacant possession of the flat. It appears, the flat was occupied by a third person, as a tenant of the appellant-vendor. It is plaintiff's case that he was and is willing to perform his part of the contract by paying the balance consideration, but the vendor refused to accept it. Therefore, suit for specific performance being Special Civil Suit No. 156 of 2012 was instituted in the Court of learned

Civil Judge, Senior Division at Thane. The suit was decreed by the learned trial Judge on 18th April, 2017 and directed the plaintiff to pay Rs.25,00,000/- to the defendant, who shall hand over the possession of the suit flat to the plaintiff.

8. The plaintiff-decree holder, vide letter dated 11th May, 2017 addressed to the defendant and to his Advocate Mr. T. N. Tripathi informed that in terms of the decree passed by the trial Court, he had drawn two pay orders in the name of the defendant for the sum of Rs.14,00,000/- and Rs.11,00,000/- respectively on the Mahanagar Co-operative Bank Ltd. and requested the defendant to accept the pay orders and hand over peaceful possession of the subject flat to him. This communication was received by the defendant, however, his Advocate declined to accept the delivery of the postal packet though its intimation was posted to him. The plaintiff-respondent has filed an affidavit and placed on record, certified copies of letter dated 11th May, 2017 addressed to the appellant-defendant, copies of the two bank pay orders. These letters are not countered by the appellant.

9. It is appellant's case that under the suit agreement the agreed consideration, was Rs.36,75000/-, however, in clause Nos.1 and 2 of it, a typographical error has occurred and agreed consideration was shown as Rs.30,00,000/-. Briefly reproduced

the relevant recitals for appreciating the arguments of the learned Counsel for the appellants and thus;

“AND WHEREAS the TRANSFEROR have agreed to sell, transfer and assign and surrender all his right, title, interest claim and interest to the TRANSFEREE and TRANSFEREE have agreed to purchase from the TRANSFEROR the said flat on “AS IT IS WHERE IT IS BASIS” together with the said share of the TRANSFEROR in the said society and as incidental thereto all the beneficial right, title, claim and interest of the TRANSFEROR in the said flat together with right to use and occupy the same at or for the agreed price of Rs.36,75,000/- (Rupees Thirty Six Lacs Seventy Five Thousand only). (emphasis supplied)

AND WHEREAS the parties hereto are desirous of reducing in writing the terms and conditions agreed between them.

NOW THIS INDENTURE WITNESSTH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS UNDER :

1) The TRANSFEROR shall sell and the TRANSFEREE shall purchase and acquire the said flat No.102 on First floor admeasuring 954 sq.Fts. + Terrace of about 200 sq.ft. (Saleable) situated at building known as AAKESHA Co-op Hsg. Society Ltd at Nerul together with the permanent and absolute right of use and occupation of the said flat and together with benefit for a consideration of Rs.30,00,000/- (Rupees Thirty Lacs only) and the TRANSFEREE has paid the earnest money Rs.5,00,000/- (Rs. Five Lacs only) by the way of cheque bearing cheque No.130701 drawn on

Mahanagar Co-op Bank, Koolaba branch dated and The TRANSFEREE will pay the balance amount of consideration Rs.25,00,000/- (Rs. Twenty Five Lacs only) by the way of cheque when the TRANSFEROR shall handover the vacant and peaceful possession of the said flat to the TRANSFEREE. (emphasis supplied)

2) *The TRANSFEREE has become the absolute owner of the said flat and the TRANSFEROR ceased his right title and interest in the said flat as soon as the TRANSFEREE paid the balance amount of consideration Rs.25,00,000/- (Rs. Twenty Five Lacs only)".* (emphasis supplied)

10. The learned Counsel for the appellant would contend that the plaintiff's willingness to pay Rs.25,00,000/-, cannot be construed to hold that plaintiff was ready and willing to perform his part of the contract. In other words, it is argued, the total agreed consideration was Rs.36,75,000/- and unless it is established plaintiff was willing to pay Rs.31,75,000/- it cannot be said he has satisfied the requirement of Section 16 (c) of the Specific Relief Act, 1963. In support of this contention he has relied on the cross examination of the plaintiff, wherein plaintiff would admit the agreed consideration was Rs.36,75,000/-.

11. I have perused the evidence of the plaintiff. In my view, a stray admission given by the plaintiff is to be appreciated upon reading his entire evidence and while doing so, other set of

evidence, which is available on record, can't be ignored. Though plaintiff has given admission that consideration agreed was Rs.36,75,000/-, but in second breath he denied the suggestion of the defendant and asserted agreed consideration was Rs.30,00,000/-.

12. To test the arguments of the appellant, I have perused his written statement. In paragraph five of the written statement, a reference is made to a notice dated 3rd February, 2011 issued by the plaintiff whereby the defendant was called upon to accept the balance consideration of Rs.20,00,000/-. In reply to the said notice, defendant admitted in terms that the balance consideration was Rs.20,00,000/-, but he declined to accept it on account of alleged delay on the part of the plaintiff and for the said delay he demanded compensation in the sum of Rs.3,50,000/-. However, he would state that it was typographical error and through oversight instead of Rs.31,75,000/- balance consideration amount was mentioned as Rs.20,00,000/-. This circumstance militates against the appellant-defendant. It may be stated, the defendant did not attempt to correct this mistake occurred in his reply till filing of written statement.

13. It may be stated that the plaintiff had paid Rs.5,00,000/- on the date of execution of the suit agreement i.e. on 3rd September,

2010. On 11th August, 2010 he paid Rs.2,50,000/- vide cheque No.149059 drawn on the Mahanagar Co-operative Bank Ltd and again Rs.2,50,000/- dated 12th August, 2010 vide cheque No.149064 drawn on Mahanagar Co-operative Bank Ltd. Both the cheques were credited in the bank account of the appellant. The plaintiff had issued a notice on 3rd February, 2011 (before instituting the suit) and had shown his willingness to pay balance consideration Rs.20,00,000/-. In reply to this notice the appellant-defendant did not dispute the amount of balance consideration, however demanded Rs.3,50,000/- towards the alleged damages caused for not paying the consideration within time. Further, on 23rd February, 2011, he posted a xerox copy of the pay order in the sum of Rs.20,00,000/- to the defendant and requested him to accept the said amount and hand over the vacant possession of the suit flat to him. However, the defendant declined to accept it.

14. The requirement of law is two-fold : (i) that the plaintiff must aver in the plaint and (ii) that he must prove by evidence that he has always been ready and willing to perform his part of the contract. In the case of R.C. Chardiok Vs. Chuni Lal Sabharwal reported in AIR 1971 SC 1238 has held thus :

“The principles have now been codified in Section 16(c) of the Specific Relief Act. Readiness and willingness cannot be treated as a strait-jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned”.

In the case in hand, (i) the plaintiff averred in the plaint his readiness and willingness to perform his part of the contract. (ii) That before instituting the suit vide notice dated 3rd February, 2011 he had requested the defendant to accept balance consideration of Rs.20,00,000/-. (iii) This balance consideration was not disputed by the defendant in his reply to the notice. (iv) That, after the decree passed by the trial Court, plaintiff requested the defendant and his Advocate to accept the balance consideration of Rs.25,00,000/- by pay orders and copies were also sent to the defendant and his Advocate on 11th May, 2017. (v) Even at this point of time, the defendant did not accept the consideration. Plaintiff has proved each of the aforesaid circumstance and thus established his readiness and willingness to perform his part of the contract.

15. As against it, the learned Counsel for the appellant would submit that in terms of the suit agreement, the balance consideration was not Rs.20,00,000/-, but Rs.26,75,000/- which the plaintiff ought to have paid or ought to have shown his readiness and willingness to pay. In my view, the submissions are

misplaced.

It may be stated that under the suit agreement, vide Clause (1) the transferee i.e. the appellant had agreed to sell the suit flat for consideration of Rs.30,00,000/- and the balance consideration of Rs.25,00,000/- was payable against the vacant and peaceful possession of the suit flat. Under the clause No.(2), it was agreed that the transferee would become absolute owner, once the balance amount of consideration Rs.25,00,000/- is paid. It may be stated that the defendant in his reply to the notice issued by the plaintiff has admitted the balance consideration was Rs.20,00,000/-, however, for the first time in the written statement, he averred that Rs.20,00,000/- as stated in the reply was by oversight and actual amount due and payable by the plaintiff was Rs.31,75,000/-. In my view, it is after thought defense and nothing prevented the appellant to correct the said mistake occurred in his reply and communicate to the plaintiff immediately. In fact, the suit agreement was registered before the Sub-Registrar and the copy of Index-2 shows the market value of the property was Rs.36,76,500/-, however, stamp duty was paid on Rs.30,00,000/-. If all the facts on record are taken into consideration together, the only conclusion to be drawn is that Rs.36,76,500/- as mentioned in the suit agreement was the

“market value” of the suit flat and not the actual consideration agreed between the parties. Thus, taking into consideration the entire evidence on record I hold that the suit agreement was executed for consideration of Rs.30,00,000/- and not Rs.36,75,000/-.

16. Learned Counsel for the appellant would submit that the evidence of appellant has gone unchallenged since he was not cross examined by the plaintiff. In support of his contention he has produced a certified copy of the Rozanama and would contend that the appellant had filed his affidavit-in-lieu of evidence on 7th March, 2017, but on one or another ground the plaintiff sought adjournment and therefore learned Judge closed the evidence. On the other hand, the learned Counsel for the respondent has brought to my notice the verification order dated 7th March, 2017, a date on which the appellant had filed his affidavit-in-lieu of evidence. Relying on the verification order dated 7th March, 2017, it is submitted by the learned Counsel for the respondent that the defendant had agreed to file on record copy of reply to the notice issued by the plaintiff before institution of the suit and on that ground the examination-in-chief of the plaintiff was deferred till next date.

17. The verification dated 7th March, 2017 recorded by the learned Civil Judge, shows that the defendant had agreed to produce on record a copy of reply given by him to the notice issued by the plaintiff before institution of the suit and on that count the examination-in-chief of the plaintiff was deferred till next date. Admittedly, the defendant has not produced the said reply on record.

Be that as it may, in my view, nothing turns on this, because, the plaintiff has established by cogent and reliable evidence that he was always ready and willing to perform his part of contract. The plaintiff has also established that agreed consideration under the suit agreement was Rs.30,00,000/- and has paid Rs.10,00,000/- to the defendant from time to time. The plaintiff has proved that, balance consideration payable was only Rs.20,00,000/-, which he was always willing to pay, and even after the decree passed by the trial Court. The plaintiff has also established that on every occasion and every time, when he was willing to pay the amount of balance consideration the defendant refused the same without any valid reason. Thus, taking into consideration the evidence on record the Courts below have not committed any error in appreciating the evidence and findings

recorded as regards to readiness and willingness of the plaintiff to perform his part of contract cannot be faulted with.

18. That, for the reasons aforesaid, the appeal does not give rise to any substantial questions of law. The appeal is therefore dismissed with no order as to costs. Pending civil application does not survive and it is disposed of.

19. Learned Counsel for the appellant at this stage would request that the impugned decree may be stayed for a period of four weeks.

In my view, taking into consideration the evidence and the conduct of the appellant, the prayer is rejected.

(SANDEEP K. SHINDE, J.)