

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

**SECOND APPEAL NO.63 OF 2015
WITH
INTERIM APPLICATION NO.1 OF 2019
WITH
CIVIL APPLICATION NO.212 OF 2015
IN
SECOND APPEAL NO.63 OF 2015**

Smt.Sushila Vijaykumar Pol & Ors. ...Appellants

V/s.

Mrs.Nirmala @ Mangal Bajram Gaikwad ...Respondent

Mr.Mangal Bhandari i/by Mr.Mangesh M. Deshmukh for the
Appellants/Applicants.

Mr.Rahul S. Kadam for the Respondent No.1.

CORAM : S.C. GUPTE, J.

DATE : 3rd DECEMBER 2019

ORAL JUDGMENT :

1. Heard learned counsel for the parties.

2. This Second Appeal challenges concurrent judgments and decrees passed by two courts below in a specific performance suit filed by the respondent (Original Plaintiff). By the impugned judgments and decrees, the suit was decreed and execution of a sale deed was ordered by the courts

against the appellants herein (original defendants).

3. There is no dispute between the parties as to the execution of the agreement for sale or payment of the entire consideration reserved under the agreement for sale by the plaintiff. The only two grounds urged before this Court in the Second Appeal concern :-

- (i) want of averment and proof of readiness and willingness on the part of the plaintiff or her predecessor for performance of their part of the contract; and
- (ii) want of payment of proper stamp duty on the agreement for sale.

4. Though it is true that in the original judgment of the trial court, there is no discussion about the plaintiff's or her predecessor's readiness or willingness to perform their part of the contract, despite an issue having been specially framed in that behalf, the learned District Judge, in the civil appeal preferred from the original decree, has satisfactorily considered

the issue.

5. Before we test the appellant's argument in this behalf, it is important to note a few admitted facts of the case. The suit property was initially owned by one Sampatrao Bhausaheb Kalate. In the year 1984, Vijaykumar, the predecessor of the defendants herein, and the plaintiff's husband (since deceased), who were real brothers, decided to purchase it. The property ad-measured about 3000 sq.ft. The plaintiff's husband decided to purchase half of the property, i.e. 1500 sq.ft., whilst Vijaykumar decided to purchase the other half, i.e. balance 1500 sq.ft. Considering, however, that at the time of the purchase, the suit property was an agricultural land and the plaintiff's husband was not an agriculturist, it was decided to purchase the property in the name of Vijaykumar alone, though half consideration for it was paid by the plaintiff's deceased husband. In these circumstances, Vijaykumar executed an agreement for sale in favour of the plaintiff's husband, acknowledging receipt of consideration from him and offering to execute the sale deed. That

agreement was of 18th November 2005. Another agreement for sale was executed between Vijaykumar and the plaintiff herein on 11th June 2007. There was no impediment in any sale under this agreement, since the plaintiff was an agriculturist. For completion of other formalities of sale such as obtaining of Gunthewari permission, a registered Power of attorney was executed by Vijaykumar in favour of the plaintiff.

6. In the light of these facts, the appellate court held that though there was no formal plea of readiness and willingness, there were adequate averments in the plaint to show that the plaintiff was ready and willing to perform her part of the contract. The Court noted that the plaintiff had specifically narrated how the transaction was effected as between her deceased husband and Vijaykumar in the year 1984; how the entire consideration was paid by her husband; how the agreement for sale was first executed between Vijaykumar and her deceased husband and thereafter between Vijaykumar and the plaintiff herein; how, after execution of the agreement for sale and power of attorney on the same date,

immediately within a span of two months, Vijaykumar had expired; and how the plaintiff thereafter approached the defendants, requesting them for execution of the sale deed, which request was denied by the defendants, leading to the filing of the present suit. The appellate court, accordingly, was satisfied that there was sufficient pleading in the plaint, as also evidence, of the plaintiff's readiness and willingness to perform her part of the contract.

7. There is no infirmity to be found in the assessment of the lower appellate court. No doubt, as the law stood when the impugned order was passed by the lower appellate court, Section 16(C) of the Specific Relief Act not only required proof of readiness and willingness but both averment **and** proof of such readiness and willingness. That, however, does not mean that there must be such averment as a matter of form; if averments made in the plaint are otherwise capable of amounting to a case of readiness and willingness without formally adopting a statement to the effect, that should satisfy the mandate of Section 16(C). Coming now to the

facts of the present case, as rightly noted by the lower appellate court, the plaintiff, in the first place, had admittedly paid all consideration to Vijaykumar, the predecessor of the defendants. What remained was only obtaining of a permission for execution of the sale deed. Though a power of attorney was obtained from Vijaykumar for seeking such permission, before doing anything in that behalf Vijaykumar expired. That was within a span of about one or one and a half month of execution of the power of attorney. Immediately, thereafter, the plaintiff approached the defendants for execution of the sale deed but they disputed the transaction, and that is how the present suit came to be filed. On these facts, the averments already made in the plaint do verify amount to a case of readiness and willingness as a matter of substance, if not as a matter of form.

8. Accordingly, no substantial question arises on application of Section-16(C) of the Specific Relief Act to the facts of the present case. The approach of the lower appellate court on this issue is clearly fair and reasonable, and the

conclusion is in accordance with law as well as supported by the evidence on record.

9. The other issue urged by learned counsel for the appellant concerns payment of stamp duty on the agreement for sale. It is submitted, on the basis of Explanation I to Article 25 of Schedule-I the Bombay Stamp Act, that an agreement for sale, when possession of any immovable property is transferred with it, is deemed to be a conveyance and stamp duty leviable on conveyance is accordingly required to be paid thereon. It is important to note in this behalf that the Courts below, as a matter of fact, have concurrently found that there was no delivery of possession of the suit property in the present case either before or after execution of the suit agreement for sale. Possession has been ordered to be delivered by the defendants to the plaintiff after execution of the sale deed, as part of a decree of specific performance. In the premises, there is no substance in the argument that stamp duty of conveyance had to be paid on the agreement or that for non-payment of such duty, the document was inadmissible in evidence or could not

have been made the basis of a decree of specific performance.

10. Besides, it does not appear from the original judgment and decree of the trial court that this objection was actually raised by the defendants before it. An objection to admissibility of a document on the ground of non-payment, or short payment, of stamp duty has to be raised, when the document is produced before the Court and sought to be marked in evidence. There is nothing on record to show that any such objection was taken of the relevant time placed before the trial court, or, for that matter, raised even at the hearing before the trial court. (The ground was, no doubt, raised before the lower appellate Court.) It is not permissible to raise such ground subsequently at the appellate stage.

11. In the premises, no substantial question of law arises even in respect of want of stamp duty or admissibility of the agreement for sale in evidence.

12. There is, accordingly, no merit in the Second

Appeal. The Second Appeal is dismissed. In view of the dismissal of the Second Appeal, the Civil Application and the Interim application do not survive and are disposed of.

(S.C. GUPTE, J.)