IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, AT NAGPUR.

SECOND APPEAL NO.394 OF 2018

(Bhaurao s/o Sitaram Hinge ..vs.. Praveen s/o Devidas Lamkhede)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Shri V.R. Choudhari, Counsel for the appellant.

CORAM : ROHIT B. DEO, J.
DATED : 26-04-2019

The unsuccessful defendant, who has suffered a decree of specific performance, is in appeal.

2. The respondent-plaintiff brought Special Civil Suit 1587/2011 for specific performance of the agreement dated 16-3-2010.

3. By judgment and decree dated 02-2-2016 rendered by the Second Joint Civil Judge (Senior Division), Nagpur the suit is decreed. Dissatisfied, the defendant preferred Regular Civil Appeal 501/2016 which is dismissed by the *Ad hoc* District Judge-4, Nagpur by judgment and decree dated 31-10-2017.

4. Shri V.R. Choudhari, learned Counsel for the appellant would submit that the substantial questions of law involved would be whether the plaintiff was ready and willing to perform his part of the contract, and the effect of escalation of the value of the property during

the pendency of the litigation ?

5. Both the Courts below have concurrently held that the plaintiff was ready and willing to perform his part of the contract.

6. Perusal of the written statement would show that the defendant did not deny that the plaintiff was ready and willing to perform his part of the contract. The plaintiff is not even suggested in the cross-examination that he was not ready and willing to perform his part of the contract.

7. The suit property is plot admeasuring 1200 square feet and the two rooms constructed thereon situated at Sonegaon, Nagpur. It is not in dispute that the defendant executed agreement of sale dated 16-3-2010 and was paid earnest of Rs.50,000/-. The agreed consideration was Rs.10,50,000/-. The plaintiff agreed to pay Rs.50,000/- to the defendant after receipt of the property card and Rs.50,000/- at the time of payment of corporation taxes and the balance consideration of Rs.9,00,000/- was payable at the time of execution and registration of the sale-deed. The plaintiff agreed to bear the expenses of obtaining NOC from Nagpur Improvement Trust and society and the defendant agreed to incur the expenses for obtaining the property card and to pay the corporation taxes. The

defendant further agreed to supply the necessary documents to the plaintiff to obtain the housing loan. The sale-deed was to be executed on or before 15-9-2010. However, if for some reason the sale-deed could not be executed on or before 15-9-2010, agreement contemplates that a mutually acceptable decision would be taken for deciding the future date.

At the request of the defendant, the plaintiff paid Rs.10,000/- to enable the defendant to mutate his name in the city survey record and further amount of Rs.10,000/- which the defendant required for securing the admission of his daughter in college. The defendant could not effect the mutation and requested the plaintiff for extension of time to execute the sale-deed and supplementary agreements dated 22-9-2010 was, therefore, executed and the time for execution of sale-deed was extended till all necessary documents are obtained. On 22-9-2010 further amount of Rs.40,000/- was paid by the plaintiff to the defendant. The plaintiff contends that the defendant assured to inform the plaintiff on receiving the property card and to provide a copy thereof to enable the plaintiff to obtain housing loan from the bank. The plaintiff kept on enquiring with the defendant about the fate of the property card, which enquiries were avoided and ultimately in July 2011 the plaintiff himself obtained the property card. Since the defendant was avoiding to execute the sale-deed, the plaintiff issued notice in response to which the defendant set up a false plea and the plaintiff, therefore, instituted the suit.

The defendant contends that it was the plaintiff who was not interested in completing the transaction. In the evidence, the defendant has deposed that he is ready and willing to execute the sale-deed at the prevailing market rate.

The trial Court appreciated the evidence on record and held that the plaintiff was ready and willing to perform his part of the contract. The trial Court has held that the defendant did not perform his part of the contract. The property card was not supplied. The defendant did not cooperate with the plaintiff in the loan process. The consideration by the trial Court reads thus :

> *"13. In a suit for specific performance of contract, plaintiff has to aver and prove with satisfactory evidence that he was always ready and willing to perform his part of contract at all material time as required under Section 16(c) of the Specific Relief Act, 1963. In this respect, plaintiff deposed that he was and is ready and willing to fulfill his part of contract. He time to time requested defendant to supply property card, but defendant failed to do so. Therefore, he himself obtained certified copy of the property card and then requested defendant for execution of sale-deed. But, defendant avoided him, therefore, he sent legal notice (Exh.27) dated 25-08-2011 informing him to clear the corporation taxes and get ready to execute registered sale-Deed. It is pertinent to note that plaintiff was intending to purchase the suit property by obtaining loan from the Bank. In this respect, defendant stated that he does not know as to whether plaintiff was intending to obtain loan from the Bank of Maharashtra, Branch Mandhal. However, on perusal*

of recitals of agreement (Exh. 25), it reveals that defendant agreed to provide all the necessary documents to plaintiff for obtaining housing loan. Likewise, on perusal of letter dated 6-02-2016 (Exh.33) it reveals that plaintiff neither supply the requisite documents i.e. property card, valuation report and structural stability report nor allowed to get inspection of the suit property and therefore, the loan proposal is kept pending. Record shows that plaintiff issued notice (Exh.31) informing defendant that he has applied for grant of housing loan from the Bank of Maharashtra and the Bank officials will come for the inspection of the property. He also informed defendant that valuation report has to be submitted and for that purpose the Architect will visit the suit property. Therefore, defendant was called upon to inform plaintiff as to when he will allow inspection. Admittedly, the notices (Exh.27 and 31) sent by plaintiff were duly served upon defendant. As pointed out earlier, it is mentioned in the agreement (Exh.25) that defendant will supply all the requisite documents to plaintiff for obtaining loan. However, defendant neither supplied necessary documents to plaintiff nor intimated him that he is ready to allow the Bank Officer to inspect the suit property for loan purpose. Furthermore, on perusal of notice reply (Exh.30) sent by defendant, it reveals that defendant had shown his readiness to execute registered sale-deed as per the prevailing market rate of the suit property. Not only this, during cross-examination also defendant firmly stated that he is ready to sale suit property to plaintiff as per today's market rate. All these facts show that though defendant agreed to sale suit property to plaintiff for total consideration of Rs.10,50,000/-, but he is not ready to execute sale-deed for said consideration and he is demanding more consideration amount. It appears that there is a tremendous increase in the prizes of properties, therefore, defendant has avoided to execute registered sale-deed in favour of plaintiff."

Shri V.R. Choudhari, learned Counsel would urge that since the loan is actually sanctioned after the institution of the suit, it must be held that the plaintiff was not ready and willing to perform his part of the contract. There is no factual foundation for the submission. No material is brought to my notice to hold that the loan was sanctioned after the institution of the suit. Be that as it may, it is irrefutable that the process was initiated by the plaintiff well within time and that the fact that the defendant did not cooperate with the plaintiff in obtaining the house loan, which is a finding of fact recorded by the Courts below, would preclude the defendant from making a capital of the sanction of the housing loan belatedly, even if it is assumed *arguendo* that the loan was, as a fact, sanctioned after the institution of the suit.

8. It must be borne in mind that the defendant did not seriously challenge the capacity of the plaintiff to pay the balance consideration. The plaintiff is not even suggested in the cross-examination that he did not have the financial capacity to pay the balance consideration. The defendant states in the evidence that he is ready to execute the sale-deed at the prevailing market rate. The Courts below have found that it was the defendant who avoided to perform his part of the contract. The further finding of the trial Court that the defendant is interested only in taking undue advantage of the escalation of the value of the property, is a finding which is possible and

plausible. The finding is certainly not perverse. No compelling case is made out for this Court to interfere with the concurrent finding of fact recorded that the plaintiff was ready and willing to perform his part of the contract.

9. The other question, which according to Shri V.R. Choudhari, learned Counsel, would be substantial question of law, is not involved. The contention that due to escalation the relief of specific performance is rendered inequitable, has no factual foundation. Both the Courts below have concurrently held, and I would concur, that it is the defendant who avoided to execute the sale-deed. Assuming that there is an escalation, and indeed ordinarily there would be some escalation, the defendant cannot be permitted to take advantage of his own wrong.

10. The appeal does not involve any question of law much less substantial question of law and is dismissed with no order as to costs.

JUDGE

adgokar