

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

SECOND APPEAL NO.377 OF 2019

(Kailash s/o Nagorao Achmelwar ..vs.. Shankarsingh Narayansingh Parihar)

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

Court's or Judge's orders

Shri S.C. Bhalerao, Counsel for the appellant.

CORAM : ROHIT B. DEO, J.

DATED : 26-08-2019

This appeal is preferred by the original defendant in Regular Civil Suit 133/2012 brought by the respondent-plaintiff for specific performance.

2. By judgment and decree dated 18-2-2016 the trial Court decreed the suit. The appellant-defendant preferred Regular Civil Appeal 31/2016 which is dismissed by the judgment dated 20-2-2019.

3. The parties shall be referred to by their status in the trial Court.

4. Concededly, the plaintiff and the defendant entered into an agreement qua the suit property, which is residential house, by and under which the defendant agreed to sell the said property to the plaintiff for consideration of Rs.4,25,000/-.

5. It is not in dispute that the defendant received

Rs.2,80,000/- from the plaintiff from time to time and that the balance consideration payable was Rs.1,45,000/-.

6. Both the Courts below have recorded a finding of fact that the plaintiff was ready and willing to perform his part of the contract.

7. However, Shri S.C. Bhalerao, learned Counsel for the defendant would submit that the Courts below failed to appreciate the clinching admission of the plaintiff that on the day which was fixed for execution of the sale-deed i.e. 13-12-2006 the plaintiff did not have the amount of Rs.1,45,000/- in the bank and that the response of the plaintiff in the cross-examination was that a friend of the plaintiff was to arrange the said amount temporarily. Shri S.C. Bhalerao would submit that although the affidavit in lieu of examination-in-chief of the person who allegedly was to arrange the balance consideration was placed on record, the said person did not step into the witness box to face cross-examination.

8. I have considered the said submission of Shri S.C. Bhalerao on the anvil of the evidence on record and the reasons recorded by the Courts below. I am satisfied, that the Courts below did not commit any error in recording a finding that the plaintiff was ready and willing to perform his part of the contract.

9. While readiness is in essence, the ability including the financial capacity to perform obligations under the contract willingness denotes the mental state and must necessarily be inferred from the evidence on record. The plaintiff paid a substantial amount to the defendant. Indeed out of the agreed consideration of Rs.4,25,000/- the plaintiff paid an amount of Rs.2,80,000/- to the defendant from time to time. It has come in evidence that the suit property was mortgaged with the bank and that the defendant was expected to clear the encumbrance. It has further come in evidence that the amount received from the plaintiff was utilized by the defendant not to clear the encumbrance on the suit property but to discharge the other debts. The stray admission in the cross-examination that one particular day the plaintiff did not have the necessary amount and expected to arrange the same from the friend would not lead to the inference that the plaintiff did not have the capacity to make the payment of the balance consideration. Ultimately the evidence has to be holistically considered, and having done so, I am satisfied that the plaintiff was ready and willing to perform his part of the contract. Several notices are issued. The fact that in the evidence the plaintiff categorically undertook to make the balance consideration and to obtain the sale-deed and the fact that when confronted with the said willingness, the defendant expressed unwillingness to execute the sale-deed in favour of the plaintiff are

circumstances which have been rightly considered by the Courts below.

10. In any event, the finding which is assailed is not a pure finding of law. In second appeal, this Court would be loath to interfere with a finding of fact or even a finding of law blended with fact unless it is shown that the finding is either perverse or that there is a serious miscarriage of justice due to error in applying the principle of law to the facts on record.

11. No question of law, muchless substantial question of law is involved in this appeal, which is accordingly dismissed.

JUDGE

adgokar