I0N THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 148 OF 2019
WITH
CIVIL APPLICATION NO. 657 OF 2018

Ahmed Aziz Kaludi. ..Appellant.
v/s.
Nischit Jinadatta Jain & ors. ..Respondents.

Mr. Ibrahim Menon i/b. Mr. Shoaib I. Meman, advocate for appellant
Mr. Ashutosh R. Gole, advocate for respondent.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : FEBRUARY 24, 2020.

P. C. :

1 Heard the learned Counsel for the appellant and the learned Counsel for the respondent.

2 The appellant herein impugns the Judgment passed Principle District Judge, Thane in Civil Appeal No. 75 of 2015 vide Judgment and Order dated 18/1/208, thereby confirming Judgment and Order dated 19/12/2014 passed by Civil Judge Sr. Division in Special Civil Suit No. 270 of 2007.

3 The substantial question of law as framed by the

appellant is as follows :

I) That the Hon'ble Appellate Court has misconstrued the legal position and judgments and the impugned judgments grant the Respondents who are persons of questionable nature to buy the said flat at the rates of the year 2006 whereas now in the year 2017 the rates have multiplied 20 times.

II) The Hon'ble Appellate Court ought to have appreciated that great harm and prejudice had been caused to the Appellant and the said flat, which is not costing 20 times of what it was costing in the year 2006, is sought to be given to the Respondent Nos. 1 and 2 who have not paid a single naya paisa to the Appellant.

4 The appellant is the original defendant. The respondent herein had filed suit for specific performance of registered agreement dated 31/8/2006. The plaintiff had also sought declaration that the said agreement is valid, subsisting, enforceable and binding on the defendant and also seeking cancellation of the notice of termination. That the defendant had issued notice of termination on 14/2/2007 and thereafter, the suit was filed on 13/4/2007. There was an amendment to the plaint on 21/9/2007. Notice of termination is issued on the ground that the payment was not made within time.

5 It is admitted position that time was not the essence of the agreement. It was the case of the defendant that on 6/1/2007 he had drawn two demand draft in the name of the appellant for amount of Rs. 5,50,000/- and Rs. 50,000/-. The plaintiff had approached office of the broker and had requested the broker to call upon the defendant to accept the said demand draft. However, it appears that there was no response from the defendants.

6 Perused the evidence on record, more particularly, evidence(cross-examination) of the defendant. The defendant has admitted in the cross-examination that it was not specifically agreed between the parties that the remainder amount ought to be paid by January, 2007. It is also admitted that the plaintiff herein had shown photo copies of the demand draft for an amount of Rs. 5,50,000/- and Rs. 50,000/- to the defendant. Both the demand drafts were drawn on ICICI Bank, Boriwali branch. The said demand drafts are marked at Exh. 75 and 76. The defendant had also admitted that the plaintiffs had requested the defendant to accept the amount and return the original agreement of sale dated 31/8/2006.

7 It is pertinent to note in this case that the defendant had not issued a notice to the plaintiff calling upon him to show

cause as to why the agreement should not be cancelled, in view of the fact that the amount is not paid. However, the agreement was unilaterally cancelled and the notice to that effect was issued on 14/2/2007 informing the plaintiff about the termination of the agreement. The plaintiff had informed the defendant that they were ready and willing to pay remaining consideration of the amount and yet the cancellation deed was unilaterally registered by the defendant.

8 Learned Counsel for the appellant vehemently submits that the plaintiff had not demonstrated as to how they were willing and ready to perform their part of the contract. It is also submitted that the theory of drawing demand drafts is an afterthought, after unilateral cancellation of the agreement and therefore, does not deserve to be relied upon, and that, it should not have inspired confidence of the Court.

9 The learned Counsel has also submitted that the plaintiff had admitted before the Court that in the earlier transaction, the present appellant had paid an amount of Rs. One Lakh to the plaintiff, in order to perform her part with the earlier vendor, who happened to be his own sister-in-law. That, he has also parted with some amount for enabling the plaintiff to deposit stamp fee. It needs to be appreciated at this stage

that earlier the sister-in-law of the present appellant had agreed to sell the same suit property to the plaintiff. However, the plaintiff had informed that they were not able to pay entire amount of Rs. 6 Lakhs and therefore, his sister-in-law who was urgently in need of money had requested the appellant to purchase the suit property to enable her to meet legal necessities.

10 It is pertinent to note that the appellant herein had not only obliged his sister-in-law but on 31/8/2006 the appellant herein had purchased the suit property from his sister-in-law. The earlier agreement of sale was cancelled. Besides that, the appellant herein on 31/8/2006 itself agreed to sell the same property to the plaintiff who was the earlier purchaser of the suit property. All the 3 agreements were registered on the same day. The conduct of the appellant is under a cloud. However, what needs to be considered is that the subsequent agreement of sale was being unilaterally cancelled by the defendant without assigning any reason for the same. It is the contention of the learned Counsel for the appellant that after 14 years of the original agreement to sale, value of the said suit property has skyrocketed and therefore, prayer for specific performance should not be granted in favour of the plaintiff.

11 It is pertinent to note that the appellant herein had not filed any counter claim or separate suit for recovery of the amount, which was allegedly paid to the Plaintiff at the time of the first transaction with his sister-in-law.

12 The defendant has admitted in cross-examination that the copies of the demand drafts were shown to him and that the plaintiff had offered to pay the defendant, subject to the condition that he complies with his part of the agreement. Admissions by a party in a suit need not be proved. Section 58 of the Indian Evidence Act reads as follows :

> *"58 Facts admitted need not be proved. —No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."*

13 Despite this, the learned Counsel for the appellant reiterates that the plaintiff was not willing to pay and there is no proof that the demand drafts were drawn. In fact, demand drafts are marked at Exh. 75 and 76. The plaintiff had placed on record not only the copies of the demand drafts, but the

bank pass-book also, in order to show that there was sufficient balance on the date when the demand drafts were drawn. Nothing more is required. The said documents are proved in evidence. It is the intention and willingness of the parties, which needs to be taken into consideration. In the present case, drawing of demand drafts itself was an implicit expression of willingness to perform the part of the agreement and the intentions were bonafide. Unless, there was intention, willingness would not have been expressed so implicitly. Time was never essence of the agreement.

14 Learned Counsel for the appellant has placed reliance upon the Judgment of the Apex Court in the case of **Jayakantham & others v/s. Abaykumar,** by placing reliance upon paragraph-11 of the Judgment. Paragraph-11 of the Judgment reads as follows:

> *"11 In our view the material which has been placed on record indicates that the terms of the contract, the conduct of parties at the time of entering into the agreement and circumstances under which the contract was entered into gave the plaintiff an unfair advantage over the defendants. These circumstances make it inequitable to enforce specific performance."*

However, the said observation has to be read in the facts of the case. The Hon'ble Apex Court in the same judgment has also taken into consideration a Judgment delivered by Bench of 3 Judges, in the case of **Nirmala Anand vs. Advent Corporation (P) Ltd. And ors.,** wherein it is held that -

> *"While balancing the equities, one of the consideration to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing the specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."*

15 In the present case, it is more than clear that the defendant i.e. present appellant was the defaulting party. The issues framed by the appellant are answered only in the facts of the case. No substantial question of law is made out.

16 For the reasons stated above, the Second appeal being sans merits, stands dismissed.

17 In view of dismissal of the second appeal, nothing survives in the Civil Application. The same is disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]

Talwalkar