

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 9 OF 2020

Nandlal J. Jumani	.. Appellant
Versus	
Rahul Panjabi	.. Respondent

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Mr. Pradeep Mandhyan with Rugbin Vakil and Manish Doshi i/b
Vimadalal & Co. for the appellant.

Mr. G.S. Hegde with C.M. Lokesh for the respondent.

CORAM: BHARATI DANGRE, J.
DATED : 17th MARCH 2020

ORAL JUDGMENT :-

1 Notice being issued in the Second Appeal on 27th September 2019, the respondent has put in an appearance. The parties state that they are ready to argue the Appeal finally since ad-interim relief is granted on 27th September 2019 and the same continue till date.

2 Second Appeal taken up is heard finally by consent of the parties.

3 Rule. Rule returnable forthwith.

4 Nandlal J. Jumaní (Defendant) is allottee of land bearing Plot No.7 admeasuring approx 775.75 sq.m situated at Baner Road, Pune in Sind Co-operative Housing Society Ltd, Aundh, Pune by a lease. The defendant held five shares of the said Housing Society bearing distinctive Nos.2270 to 2274 under the Share Certificate No.134. The defendant agreed to sell the suit premises to Shri Rahul Punjabi (Plaintiff) for consideration of Rs.77,20,975/- and agreed to assign right, title and interest in the suit property in his favour. The plaintiff paid the sum of Rs.Five lakhs to the defendant as earnest deposit and pursuant thereto, a Memorandum of Understanding was executed on 4th April 2005 between the parties.

5 The plaintiff being aggrieved by non-compliance of the stipulation in the Memorandum of Understanding and being not satisfied with the steps taken by the defendant and on his failure to supply the necessary documents in terms of the MOU addressed letters to the defendant on 9th September 2005, 10th October 2005, 1st November 2005 and 6th November 2005 and sought necessary details of the discrepancies which he found in the area of the land mentioned in agreement and in the 7/12 extract, demarcation plan and lease deed. The defendant, on 30th September 2005, responded and alleged that the plaintiff is not interested in completing the deal and threatened to forfeit the deposit paid to him. The defendant by notice dated 31st March

2006 informed the plaintiff that he has terminated the contract since the plaintiff was not ready to accept the title of the defendant over the suit property. Another reason cited was that the plaintiff already was a Member of the said society and in terms of the bye-laws of Sind Co-operative Housing Society, the permission to replace the plaintiff as a Member of the Society in place of the defendant has been rejected. The defendant thus terminated the agreement entered into between the parties and this constrained the plaintiff to file Special Civil Suit before the Joint Civil Judge, Senior Division, Pune.

6 Special Civil Suit numbered as S.C. Suit No.1626 of 2008 sought specific performance of contract and a declaration that notice 31st March 2006 terminating the agreement is illegal and bad in law. It also sought a relief of permanent injunction restraining the defendants from selling or disposing of the suit property and the mandatory injunction directing the defendant to hold the share certificate no.134 in respect of the suit property as trustees of the plaintiff.

7 The Suit was resisted by the defendant by filing written statement as well as additional written statement. Execution of MOU was admitted. So also the receipt of earnest money of Rs.Five lakhs. The defendant, however disputed that the MOU was the concluded contract and that the plaintiff was

ready and willing to perform the part of the contract and it was the defendant who was in breach of the contract. The defendant also referred to earlier Civil Suit vide No. 485 of 2007 instituted by the plaintiff in the City Civil Court, Mumbai seeking declaration cum permanent injunction only in respect of the present agreement. According to the defendant, the said suit was disposed of on the point of jurisdiction and the plaintiff in the said suit had never sought the relief of specific performance and therefore, according to the defendant, the Suit is barred by applying Order 2 Rule 2 of the Code of Civil Procedure.

8 In defence, it was further stated that the plaintiff is estopped from challenging the right of the defendant as lessee in respect of the said plot along with the ownership as the defendant is the exclusive owner of the suit property by virtue of registered lease deed dated 12th April 2005 and the plot was allotted to the defendant by a resolution passed by the Society with effect from 27th June 1969. The plaintiff was raising doubt about his title and therefore, he terminated the MOU by issuing a notice and particularly when the Society could not have permitted the plaintiff to hold two plots as per the bye-laws of the society. The defendant took a stand that he had returned the amount of security deposit by cheque to the plaintiff and since the plaintiff has not returned the cheque, it is presumed to be accepted towards the amount due for cancellation of the transaction. The

defendant also pleaded that the plaintiff lacked the readiness and willingness and he did not possess necessary funds to purchase the suit property by deposit of the balance consideration.

9 The learned Civil Judge, Senior Division, answered 8 issues framed by it in the affirmative and held that the plaintiff had proved a concluded contract for alienation of suit property and instead of his readiness and willingness to perform his part of the contract, the defendant had avoided to execute final deed of conveyance. The Court also held that the notice issued by the defendant on 31st March 2006 terminating the suit agreement is bad, illegal and do not bind the plaintiff. The suit filed by the plaintiff for Specific Performance came to be decreed on 3rd May 2012 by the Joint Civil Judge, Sr. Division, Pune and plaintiff was directed to deposit the consideration of Rs.72,20,975/- within one month and the defendant was directed to execute the sale deed of the suit property within a period of two months from the date of the order. Failure to execute the sale deed, the plaintiff was given liberty to apply for the appointment of the Commissioner to execute the same through the process of Court. The termination dated 31st March 2006 was declared to be illegal and bad in law and the defendant was permanently restrained from creating any third party interest in the suit property. The defendant was also directed to apply to the Society for transfer of the share certificate in favour of the plaintiff.

10 The defendant who was aggrieved by the decree filed a Regular Civil Appeal in the Court of District Judge-2, Pune which was numbered as RCA No.249 of 2016. The Appellate Court, concurred with the finding of the trial Court and held that the execution of Memorandum of Understanding (Exhibit 124) set out the intention of the parties. The Court concluded that the said the MOU did not fall short in any manner to the agreement to sale since the MOU itself indicated that there were oral negotiations between the parties which were reduced into writing. Concurring with the trial Court, that the MOU is a concluded contract between the parties, the Appellate Court did not find substance in the submission of the appellant that the Secretary of the Society had refused the transfer of the share certificate in favour of the plaintiff and reference was made to a Civil Suit No. 1138 of 2005 reflecting that the plaintiff's vendee had obtained injunction against him restraining him from alienating his plot no.264. The plaintiff was therefore, found to be already in an agreement to sale in respect his plot and therefore, since he had already sold his plot, the bye-laws restricting a member of the Society to hold only one plot was found to be not creating an incompetency in the plaintiff to enter into the MOU with the defendant.

11 As regards readiness and willingness of the plaintiff, to adhere to the agreement and perform his part, the Appellate Court held that the defendant had raised a faint plea about the financial ability of the plaintiff to pay the balance consideration amount but it is not necessary that he should carry the money with him and the fact that plaintiff had deposited balance consideration amount in the Court, lead to an irresistible conclusion about his financial capacity to pay the consideration amount. After commenting about the conduct of the defendant and the steps which he ought to have taken under the MOU, the Appellate Court dismissed the Appeal holding that there exists a legally enforceable agreement to sale and the plaintiff was ready and willing to perform his part of the contract. In this backdrop the cancellation of MOU by the defendant is illegal and the interference by the trial Court by exercising the discretion in favour of the plaintiff by granting decree of specific performance of contract and consequential relief of declaration, possession and injunction was found to be without any fault. Resultantly, the Appeal came to be dismissed.

12 The Memorandum of Appeal filed by the appellant raise several questions of fact and law but worth it to be noted that none of them fall within the scope of “substantial question of law” which permits the Court to entertain a Second Appeal under Section 100 of the Code of Civil Procedure. For returning the

said finding, certain documents require a reference. The most pivotal document is the Memorandum of Understanding executed between the parties for sale of the suit plot and from the compilation of documents placed on record by the appellant, the MOU is perused by me.

13 The Memorandum of Understanding dated 23rd March 2005 scribed on a stamp paper of Rs.100/- categorically aver that Rahul Punjabi had approached the party of First Part – Nandlal Jumani, owner of parcel of land (with structures thereon) being plot no.7 (new) of private scheme of Sind Co-operative Housing Society to sell to him all his rights, title and interest in the said shares and property admeasuring approx 8,347 sq.ft / 775.70 sq.ft @ 925 per sq.ft i.e. for total consideration of Rs.77,20,975/-. The Memorandum of Understanding contain a recital to the effect that the first part of the owner of the property has agreed to sell to the party of the second part his right, title and interest in the said shares for the consideration mentioned above and since the parties are desirous of reducing into writing, the terms and conditions mutually agreed amongst them and thus the said Memorandum of Understanding.

14 The various clauses in the MOU distinctly refer to the responsibility to be discharged by the respective parties. It is recorded that the purchaser - second part of the agreement on the

day of the agreement had paid a sum of Rs.Five lakhs an earnest deposit without interest. The party of the first part (seller) on receipt of the said deposit was to hand over the copies of the following documents to the purchaser being (a) share certificate no.134 (b) Letter of allotment issued by Sind Society in favour of party of first part, (c) copy of building plan and demarcation plan and (d) copy of latest 7/12 extract.

15 Before signing of the conveyance, the documents like the N.A. permission, copy of lease deed, NOC from competent authority under the ULC Act and approval from the Society to admit the purchaser as a Member of the Society was to be handed over to the purchaser. A duty was cast on the seller to procure and produce all documents incidental to sale of plot from the society and other Government departments including the NOC. The MOU also contain a declaration on part of the first part that he is the sole owner of the plot and he is entitled to sell the plot in the manner of his choice. Duty was cast on the second part to pay the balance consideration of Rs.72,30,975/- on or before signing of the final conveyance before the Registrar which should be within 15 days from procurement of above-mentioned documents. In clause No.3, the MOU also stipulate that on failure to pay balance consideration within the stipulated time limit on behalf of the plaintiff, the defendant had right to forfeit the earnest money by giving 15 days notice. On receipt of the

balance consideration and on signing the final agreement, it was imperative for the defendant to hand over the vacant and peaceful possession of the suit property to the plaintiff.

16 The said MOU is contested by the defendant stating that it do not amount to a contract. In terms of Section 10 of the Indian Contract Act, every agreement is not a contract but every contract consist of an agreement. In order that an agreement amounts to a contract, it can be in oral form or in writing and with the free consent of the parties. It is not the case of the defendant that the agreement suffer from any legal lacunae. On the contrary, the execution of the MOU has been not disputed by the defendant. MOU contemplated execution of the deed of conveyance within a period of 15 days and the fact that the defendant accepted the earnest money of Rupees Five lakhs while executing the MOU on 23rd March 2005 itself speak of the intention of the parties. MOU itself record the receipt of an amount of Rs.Five lakhs as earnest deposit towards the transaction. On the said deposit, it was incumbent on part of the defendant to hand over the share certificate to the plaintiff along with the letter of allotment issued by the Sind Society in his favour. Certain documents to be submitted before signing of the conveyance were also made part of the MOU and therefore, defendant raised a plea that it is not a concluded contract is an after-thought. Whether there is a concluded contract or not is a

question of fact to be determined in the facts and circumstances of each individual case. The terms and stipulations in the MOU and the conduct of the parties have rightly led both the Courts below to infer that there was a concluded contract between the parties.

17 The next issue that fall for consideration is the readiness and willingness of the plaintiff to perform his part of the contract being to pay the balance consideration. The plaintiff on noting certain discrepancies in the area of the plot addressed a letter to the defendant and sought the documents like demarcation plan from the City Survey, letter of allotment issued by the Society, 7/12 extract of the suit plot and the lease deed between himself and the society. The queries raised by the plaintiff with the defendant for ascertaining the actual area of the plot and in procuring the demarcation plans cannot be construed as dilatory tactics by the plaintiff on the basis of which the defendant inferred that the plaintiff is not ready and willing to perform his part of the contract. It is the defendant who preferred the application on 31st October 2005 to the Society for transfer of plot in favour of the plaintiff. The rejection letter of the very same date i.e. 31st October 2005 is signed by the Secretary thereby informing the defendant that since Mr.Rahul Punjabi is already a member of the Society and leased out Plot No.264, they request for sale/transfer of Plot No.7 to him, cannot be

considered. The said rejection by the Secretary of the Society has been dealt by the Courts below by holding that the Secretary is not the competent person to take a decision on membership to the Society and it is the general body which is authorized to confer or refuse the membership. The Chairman of the Society in the cross-examination has admitted that the Society has not passed any resolution and when he signed the letter dated 31st October 2005, there was no resolution passed by the Society. Furthermore, Rule 11 of the bye-laws of the Society would come into play while transferring the shares and which would happen at the time of sale deed and the restriction cannot be preponed at the stage of agreement to sale.

18 The Courts below have clearly answered the issue of readiness and willingness of the plaintiff in his favour and held him entitled for specific performance. Framed as an issue, the Appellate Court has noted that the MOU stipulated that the defendant will supply documents of the suit to the plaintiff and the plaintiff expressed through his letter that the plot area which is shown in the MOU defer from the one mentioned in the 7/12 extract, building plan and lease deed. The plaintiff had asked the defendant to get a declaration from all the surviving heirs of his father of No right, title or interest in the property since the defendant was acting as a nominee of his father in respect of the suit plot. Th exchange of letters between the parties and in the

ultimatum, letter at Exhibit-146 by which the defendant cancelled the MOU on the pretext on the plaintiff is not interested in purchasing the suit plot also contain another reason that he is not eligible to purchase it. The defendant who was duty bound to obtain a clear and marketable title to the suit plot as well as the area of the suit plot could not be said to be unjustified in demanding the details from his vendor. At his level, he had expressed his willingness to get the building plan approved from Pune Municipal Corporation at his own expenses so that the area of the suit plot can be determined and he sought consent of his vendor for the said purpose to which there was no response from the defendant. The said correspondence cannot be said to be a ploy to frustrate the agreement; since he wanted to be sure about what he was to get and therefore, it cannot be said that he was not ready and willing to perform his part of the contract. It is settled position of law that the readiness and willingness need not necessarily be pleaded but it will have to be inferred from the conduct of the parties. The fact that the plaintiff had deposited the balance consideration in the Court is itself depictive of his financial capacity to arrange for the balance consideration and in any contingency, he should not be ready with the cash to show readiness but he should be able to arrange for the cash whenever he is required to execute his part of the agreement. That is sufficient to demonstrate the readiness and willingness on his part and both the Courts below have concurrently held that there was

‘Readiness and Willingness’ on his part to perform his part of the contract. The defendant by not taking any steps to execute the final deed of conveyance rather is in breach of the agreement.

19 The MOU contemplated the handing over of the document in favour of the plaintiff including the share certificate immediately on the receipt of the deposit as earnest money. There was no compliance as to the said stipulation. Before the execution of the conveyance within a period of 15 days from the date of signing of the MOU, it was contemplated on part of the defendant to obtain the non-agricultural permission as well as the NOC from the competent authority under the ULC Act. It also stipulated approval to be obtained from the Society to admit the plaintiff as member of the Society. On the pretext of the letter dated 31st October 2005, which the Secretary of the Society has deposed that his letter was not backed by authorization or resolution of the Society, the defendant assumed that there is no readiness and willingness on part of the plaintiff and proceeded to put an end to the agreement entered into between them on 31st March 2006. The said document addressed to the plaintiff *inter alia* state that since the plaintiff has not accepted his title and he is not eligible to purchase the property being a member of the Society already and since the Society has not approved the sale of plot since it was not permissible for a Member to hold more than one plot in the Society, the defendant was entitled to terminate

the Memorandum of Agreement. In a riff-raff manner, the defendant also returned the plaintiff's earnest deposit of Rs.Five lakhs by enclosing the cheque. The termination of the agreement by the aforesaid letter has been found to be illegal by both the Courts below since the agreement executed between the parties was a legally enforceable agreement and after recording the finding that the plaintiff was ready and willing to perform his part of the contract, the cancellation of the agreement unilaterally by the defendant did not augur well and the Courts are concurrent in its finding to that effect.

20 Construed in the factual context and in the legal scenario that the readiness and willingness on part of the plaintiff has been established by him whereas the breach on part of the defendant was apparent the Courts below have rightly construed the factual scenario coupled with the legal provision which permitted specific performance of the contract in favour of the plaintiff and has rightly allowed the claim. Since no illegality or perversity is to be found in the concurrent finding recorded by the Court below; the present Appeal deserve a rejection and Second Appeal No.9 of 2020 is dismissed upholding the judgment dated 3rd May 2012 passed by the 3rd Joint Civil Judge, Sr. Division, Pune in Special Civil Suit No.1626/2008 and 27th June 2019 passed by District Court-11, Pune City in RCA No. 249/2016.

21 Decree be drawn up accordingly.

22 When the judgment was pronounced, learned counsel for the appellant pray for continuation of the interim relief granted by this Court by order dated 27th September 2019. Learned counsel for the respondent vehemently opposed continuation of the said relief. However, since the position is prevailing for a considerable long time, ad-interim relief granted on 27th September 2019 to continue till the period of two weeks from today.

SMT. BHARATI DANGRE, J