

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

MISC CIVIL APPLICATION NO. 1004 OF 2015
IN
SECOND APPEAL NO. 2 OF 2001

(Kashirao Sheshrao Gawande (dead) & others Vs. Pralhad K. Mate)

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

Court's or Judge's orders.

Shri Jaideep J. Chandurkar, learned counsel for the applicants.

Shri C.A. Joshi, learned counsel for the non-applicant.

CORAM : ANIL S KILOR, J.
DATE : 20th JANUARY, 2020.

Shri Chandurkar, learned counsel for the applicant submits that this Court on 24th March, 2015 was pleased to dismiss the Second Appeal by recording the reasons in paragraph no.6, which read thus :-

“6. There is a very peculiar feature of this case which is discussed by the learned Judge of the appellate Court. He pointed out that when the appellant/plaintiff came to the Court initially he filed this suit only for recovery of earnest amount. At that

point of time he said, that the appellant/plaintiff was not ready and willing to perform his part of contract. The learned Counsel for the appellant assailed this finding by saying that the conclusion drawn by the learned Judge of the appellate Court was perverse and not based on any evidence or any pleadings. He pointed out that though the appellant/plaintiff filed suit with different pleadings initially, subsequently he changed those pleadings by permission of the Court and what is not pleaded after the amendment should be kept out of the consideration. He further pointed out that appellant/plaintiff made clear statement on oath in his deposition that he was ready and willing to perform his part of the contract which has gone unchallenged on record. In a way his submission is quite plausible. In a case of this nature, on one hand, the appellant/plaintiff made in his deposition a bald statement that he was ready and willingness to perform his part of contract. He did not utter a single word as to why he initially filed this suit only for refund of the earnest. Unfortunately, even the respondent/defendant's cross examiner did not ask him the pertinent question to bring on record

*that initially the pleadings in the
plaint were different etc.
Nonetheless, the learned Judge of the
appellate Court taking a birds eye
view of the facts of the case came to a
conclusion that the appellant/plaintiff
would fail to prove his case squarely
within the parameters of Section
16(c) of the said Act. I would also
record my finding that the appellant/
plaintiff would fail to prove that he
was ready and willing to perform his
part of contract 'all the time'. Section
16(c) of the said Act requires the
plaintiff not only to plead but also to
prove that he had performed and he
had always been ready and willing to
perform the terms of the contract
which are performed by him. The
factum of his readiness and
willingness is required to be adjudged
with reference to the conduct of the
parties and attending circumstances.
From the circumstances discussed
above, I am inclined to infer that the
appellant/plaintiff was not really
ready and willing to perform his part
of contract in interregnum. One more
reason would compel me not to take
any other view. The transaction is of
1983 and we are now in 2015, the
respondent/defendant could retain
his control on the land till today.
Number of changes must have taken
place after 1983 and if the suit is*

decreed, this position of the respondent/defendant would get changed drastically. I am not inclined to be party to such change. I would rather to dismiss the appeal and maintain the impugned judgment and decree of the appellate Court.”

2. Shri Chandurkar, learned counsel for the applicant points out that initially the suit was filed with a prayer for refund of earnest amount. However, during the pendency of the suit, permission to sell of the land in question was granted by Sub Divisional Officer and accordingly suit was amended and prayer for specific performance was added alongwith necessary paragraphs.

3. He has pointed out in the amended suit, there was specific pleading in respect of readiness and willingness to perform part of contract by the plaintiff and considering it the learned trial Court decreed the suit.

4. He further points out that in the first appeal, the learned Lower Appellate Court reversed the said decree on the ground that the plaintiff failed

to plead and prove the willingness and readiness.

5. According to Shri Chandurkar, learned counsel for the applicant, the lower Appellate Court had given unnecessary importance to the fact that the earlier the suit was only for return of earnest amount and it was not specific performance.

6. He submits that once the amendment was granted and it was upheld in revision, the lower appellate Court cannot go into the question of amendment and according to him, therefore the findings given by this Court in judgment dated 24th March, 2005 in relation to non-compliance of Section 16(c) of the Specific Relief Act, 1963 needs to be reviewed.

7. Per contra, learned counsel Shri Joshi for the respondent has drawn my attention to the deposition of the plaintiff. In para 2 of the deposition of plaintiff, he has only deposed in respect of his readiness and except that statement there is nothing on record to show that the plaintiff was ready and willing to perform his part of contract. Para 2 of the

deposition read thus :-

“After execution of agreement in the month the defendant no.1 gifted the suit field to defendant no.2. I am ready to purchase the suit field. The suit field is still fallow.”

8. Shri Joshi, learned counsel for the respondent has pointed out that the lower Appellate Court not only considered the fact that the suit was initially filed for returned of earnest amount and subsequently prayer for specific performance was added, but on merit also the learned lower Appellate Court has observed that the plaintiff has failed to plead and proved the compliance of Section 16(c) of the Specific Relief Act, 1963 and therefore it is not correct to say that only on the reason that the suit was initially filed for returned of earnest amount, the appeal was dismissed.

9. Shri Joshi, learned counsel for the respondents has also invited my attention to the relevant paras of the plaint prior to amendment and

after amendment.

10. To consider the rival contentions of the parties, I have gone through the record and evidence available on record.

11. The contention of Shri Chandurkar, learned counsel for the appellant that lower Appellate Court as well as this Court have held against the plaintiff only because initially the suit was filed for return of earnest amount and not for specific performance, is rejected as the record shows that the Lower Appellate Court has decided the appeal on merit and has considered the other relevant factors than the only fact that the suit was for return of earnest amount, prior to amendment. Even in the deposition of the plaintiff, there is nothing to show that the plaintiff has proved the issue relating to willingness and readiness and thus, I do not find any substance in the contention of the plaintiff/applicant.

12. In view of the matter, I do not find any merit in the present application, as this Court has rightly observed in clear terms that as there is no

compliance of Section 16(c) of the Specific Relief Act which is pre-requirement for grant of relief of specific performance.

13. Accordingly, application for review is rejected.

JUDGE

sknair