

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

SECOND APPEAL NO. 512 OF 2019

Ab. Kayyum Sk. Fazal...Versus...Umesh Vitthal Jathav

with

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

Court's or Judge's orders

Shri A.S. Deshpande, Counsel for appellant in both appeals
Shri V.N. Patre, Counsel for respondent in both appeals

CORAM : AVINASH G. GHAROTE, J.

DATE : 20/02/2020

1. On 03/12/2019, notices were issued on the following substantial questions of law.

“(i) Whether the First Appellate Court erred in not appreciating the provisions of Section 16(c) of the Specific Relief Act in proper perspective ?

(ii) Whether the guardian can proceed the suit for filed by minor even on attaining majority by minor in the light of Order XXXII Rule 12 of the Code of Civil Procedure and what is its consequence on proceeding ?

(iii) Whether the First Appellate Court misread the evidence on record or misinterpreted the provisions of law while granting specific performance and refusing the counter claim for possession decree ?”

2. Heard Mr. A.S. Deshpande, learned Counsel for the appellant and Mr. V.N. Patre, learned Counsel for the respondent.

3. In the instant matter, the agreement of sale dated 04.11.2003, (Exh.31), in respect of survey No.128/2 admeasuring 2.3 HR., Mouza-Kalgaon, as well as its term and conditions are admitted. It is further admitted, that on the date of the agreement, a part consideration of Rs. 25000/-, stood paid and a further part consideration of Rs. 55,000/- was paid on 04/01/2004. It is further admitted that the sale-deed was to be executed and registered on or before 31/05/2005, upon receipt of the balance consideration, prior to which the suit property, was to be measured and the loan incurred thereupon, was to be repaid. The agreement is duly registered with the office of the Sub-Registrar, Digra at Sr. No. 2328/03.

4. On 16/06/2005, the respondent/plaintiff issued a notice to the appellant/defendant, stating that he was ready and willing to pay the balance consideration and sale-deed be executed and registered in his favour. He, therefore, called

upon the defendant to attend the office of the Sub-Registrar on 23/06/2005. On 23/06/2005, the plaintiff was present before the Sub-Registrar, Digra and to mark his presence, on which date a stamp paper (Exh.25) was duly purchased by him. The defendant, however, did not turn up resultant to which the suit for specific performance bearing Special Civil Suit No.21/2006, came to be filed on 20/10/2006 against the defendant/appellant, who was minor aged 15 years at that point of time, through his natural guardian father.

5. Apprehending that possession would be forcibly taken, the defendant/appellant had filed a suit for permanent injunction bearing Regular Civil Suit No.124/2005, in which the application for grant of temporary injunction came to be dismissed. The suit itself, came to be dismissed in default on 02/03/2006. Thereafter, as it was claimed that possession was forcibly taken on 06/07/2005, a counter-claim was filed by the defendant, in Special Civil Suit No.21/2006, claiming a decree of possession.

6. The Trial Court framed an issue regarding readiness and willingness of the plaintiff/respondent, as issue No.1, and answered the same in the negative, for the reason, that the plaintiff had not deposited the balance consideration in the Court, nor had deposited the same in any bank and produced the deposit receipt to demonstrate that he was having the balance consideration available. The Trial Court further held that plaintiff in cross examination, had stated that

on the date of the cross-examination he had only about Rs.40,000/- to 50,000/- in his bank and even to demonstrate this no document was produced which indicated the absence of readiness and willingness.

7. The Trial Court further framed issue No.2 as to whether time was the essence of contract, and answered the same in the affirmative, as the date of 31/05/2005 was fixed for the execution & registration of the deed of sale. Another reason for the dismissal of the suit for specific performance by Trial Court was that the suit was filed belatedly, i.e., 17 months after the refusal by the defendant to do so on 20/10/2006. The learned Trial Court, also declined to grant a decree for refund of part consideration and also dismissed the counter-claim as filed by the defendant/appellant for possession on the ground, that the record showed that the property was in possession of the father of defendant/appellant and any claim for possession would lie against him.

8. The learned First Appellate Court, found that time was not the essence of contract, and so also the record demonstrates that the plaintiff was ready and willing to perform his part of the contract. It countered the finding by the learned Trial Court, that as on the date of cross-examination the availability of Rs 40,000/- to 50,000/- in his account, would not be a criteria to hold that the plaintiff was not ready and willing. Since the agreement and terms and

conditions were admitted, it therefore decreed the suit for specific performance and dismissed the counter-claim for possession.

9. Mr. Deshpande, learned Counsel for the appellant submits, that there was no averment as to readiness and willingness in the plaint, as is the mandatory requirement of Form - 47 of the Code of Civil procedure. The plea does not stand to merit, for the reason that a perusal of the plaint which was tendered across the bar, demonstrates that in paragraph No.7, a specific averment has been made that the plaintiff was ready and willing to perform his part of the contract and was still ready and willing as on the date of filing of the suit, which in my opinion, is sufficient compliance with the requirement of Form - 47 of the Code of Civil Procedure and Section 16(c) of the Specific Relief Act, 1963.

10. The next contention is that the plaintiff was not ready and willing to perform his part of the contract. A perusal of Exh.37, as tendered by the learned Counsel for the appellant across the bar, demonstrates that the suit property was mortgaged with the Yavatmal District Co-Operative Rural Agricultural Multipurpose Development Bank, Branch Digras. Exh. 37 the certificate dated 30/05/2005, demonstrates that as on that date, a balance loan of Rs 75,874/-, was outstanding against the defendant. It is trite position of law, that an agreement of sale, contains reciprocal promises to be performed, inasmuch as in the instant matter, the time for

making payment of the balance consideration would have arisen only upon receipt of an intimation in writing by defendant that the obligations upon the defendant as contemplated in the agreement, namely, of (a) having measured the property and (b) having cleared the loan, was given to the defendant as that was what was agreed to by the defendant in the agreement dated 04/11/2003. Even otherwise, the plaintiff/Umesh, as found by the learned Trial Court in paragraph No.10 of its judgment, was present in the office of the Sub-Registrar, Digra on 31/05/2005, on which date the defendant also was stated to be present, however, no sale-deed came to be executed and registered.

11. It is a trite position of law, that to demonstrate readiness and willingness, it is not necessary for the plaintiff, seeking specific performance to show that he has ready money available or is having a concluded scheme to finance the transaction. Neither it is the requirement of law for the plaintiff to deposit the balance consideration in the Court, or in any bank to demonstrate his readiness and willingness. That being the position, the finding of the learned Trial Court that the plaintiff was not ready and willing as he had not deposited the balance consideration in the Court or deposited the same in a bank, has rightly been set aside by the First Appellate Court.

12. It is an admitted position on record that, on 31/05/2005, the defendant, was not in a position to execute

and register the sale-deed of the suit property in favour of the plaintiff, as the suit property, even on that date stood mortgaged to the bank/society. Not only this the suit property was also not got measured, as was the condition of the agreement. Thus, when the defendant himself, was not in a position to transfer a clear title to the suit property as on 31/05/2005, it cannot be said, that absence of the plaintiff, to show the money, or a concluded scheme to finance the transaction, would result in rendering a finding as to his absence of readiness and willingness.

13. It is also a settled position of law, that in transactions relating to immovable property, generally time is not the essence of contract, unless the parties, by volition specifically make it so. In the instant case, since the property was already mortgaged to the bank/society, and also was required to be measured, the question of time being of the essence of contract did not arise at all.

14. Mr. Deshpande, learned Counsel for the appellant thereafter, contends that since the defendant was minor on the date of institution of the suit and attained majority during the pendency of the suit, the suit could not have been proceeded against the defendant, through his father the natural guardian, for which he invites my attention to the provisions of Order XXXII, Rule 12 of Code of Civil Procedure. It is material to note, that the provisions of Order XXXII, Rule 12 of the Code of Civil Procedure, delineate the course to be

followed by a minor plaintiff on attaining majority. In the suit filed by the respondent/plaintiff for specific performance the appellant/defendant, at that time was a minor. It was not a suit instituted by a minor and therefore, insofar as the suit as filed by the plaintiff for specific performance, the provisions of Order XXXII, Rule 12 of the Code of Civil Procedure, would not be of any assistance to him. In fact, Order XXXII, Rule 12 of the Code of Civil Procedure, would be clearly attracted, to the counter-claim as filed by the defendant for possession. It is an admitted position, that though the defendant attained majority during the pendency of the suit, the suit as well as the counter claim was continued by his father, without any demur from him. In fact, the defendant/appellant, came into picture only after the judgment and decree as passed by the Trial Court dismissing the counter-claim which was challenged by him by filing an appeal bearing Regular Civil Appeal No.16/2011.

15. Even otherwise, the provisions of Order XXXII, Rule 12 of the Code of Civil Procedure, are clearly directory as held by the learned Single Judge of this Court in *Ku. Arpana d/o Prithviraj Punwatkar vs. Shrirang s/o Shripat Punekar & Ors.*, reported in *2018 (4) ALL MR 359* in paragraph 16 thereof, and I am in complete agreement with the same, for the additional reason, that Order XXXII, Rule 12 of the Code of Civil Procedure, does not provide any consequences on failure of the minor to elect to prosecute the suit on his

attaining majority.

16. The First Appellate Court has rightly appreciated the evidence as led before the Trial Court, in its correct perspective, specifically in light of the certificate at Exh.37, issued by the bank/society stating that the property was mortgaged and the amount of Rs.75,874/- was still outstanding against the defendant as on 31/05/2005 and further that the suit property was placed in possession of the plaintiff on lease, in light of which, the plea of forcible possession and the consequent dismissal of the counter-claim cannot be faulted with.

17. That being so, in my humble opinion, no question of law much less any substantial question of law is involved in the present appeals. The Second Appeals are therefore, without any merits and are accordingly dismissed with no order as to costs.

JUDGE