

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.144 OF 2022

Shri Rajendra Mohanlal Agrawal .. Appellant

Versus

Shri Abhay Tejraj Rathod and another .. Respondents

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Mr. R.N. Dhorde, Senior Advocate i/by. Mr. Mukul S. Kulkarni,
Advocate for the Appellant

Mr. Pramod C. Mayure, Advocate for Respondent No.1 (Caveator)

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WITH

CIVIL APPLICATION NO.3587 OF 2022

IN

SECOND APPEAL NO.144 OF 2022

....

CORAM : MANGESH S. PATIL, J.

DATE : 14-03-2022

PER COURT :

. Heard both the sides on the point of admission.

2. The appellant is the original plaintiff, who is seeking specific performance of a registered agreement of sale dated 18-06-2004 whereby the respondents agreed to sell the suit property for total consideration of Rs.36,01,000/- by receiving Rs.5,00,000/- as earnest money. The sale-deed was to be executed before

10-12-2004. On failure to get the sale-deed executed, the balance amount of consideration was to carry interest at the rate of 12% per annum.

3. The appellant issued a public notice on 11-08-2005 calling upon the objections to the sale. The respondents responded by issuing two public notices soon thereafter contending that the agreement was cancelled and also contending that in fact no agreement was entered into and nothing was accepted as earnest. The appellant again responded with another notice on 29-08-2005 disclosing his identity. He then by the notice through his advocate dated 12-01-2006 called upon the respondents to execute the sale deed. By the reply dated 13-02-2006 they refused to execute the sale-deed. He then issued a telegram dated 02-11-2006 and instituted the suit on 05-12-2007.

4. The respondents contested the suit by filing written statement. They admitted execution of the agreement and having received earnest amount. However, they contended that the time was the essence of the contract and the agreement stood cancelled due to non-performance. They also contended that they were present in the office of the Registrar on 30-08-2005 to execute

the sale-deed.

5. The trial court framed necessary issues. The appellant stepped into the witness box and was cross-examined on behalf of the respondents, but, they did not lead any evidence on their own. The trial court upheld the agreement, but refused to grant specific performance by recording a negative finding to the issue regarding readiness and willingness of the appellant and directed refund of earnest together with interest @ 6% per annum from the date of the suit till realization of the decretal amount.

6. The appellant challenged the judgment of the trial court before the district court which concurred with the findings of the trial court and dismissed the appeal, however, awarded future interest to the appellant @ 12 % per annum in stead of 6% awarded by the trial court.

7. The learned Senior Advocate Mr. R.N. Dhorde for the appellant would vehemently submit that the agreement was in respect of purchase of the immovable property and therefore, it cannot be said that time was the essence of the contract. Though the performance was sought in time, the courts below erred in recording

a perverse and arbitrary finding that the appellant was not ready and willing to perform his part of the contract. In fact, the respondents were not consistent with their stand. In one of the notices they denied to have ever entered into any agreement and also denied to have received any earnest money, but then complained of time being the essence of the contract and the agreement having been cancelled. He would further submit that unlike the appellant, the respondents did not dare to step into the witness box to substantiate their allegations. The courts below though have concurred in material particulars, have recorded perverse and arbitrary findings. They have clearly overlooked that in view of the amendment in the Specific Relief Act the element of discretion which was vesting with the courts has been taken away and granting specific performance is now made a rule of law. The courts below have deviated from this principle. Substantial questions of law arise for determination in this Second Appeal, which deserves to be admitted.

8. Mr. Dhorde would also rely upon the decision in the case of **Bhavyanath represented by Power of Attorney Holder Vs. K.V. Balan (Dead) Through Legal Representatives, (2020) 11 SCC 790**, to substantiate his argument that it is not always necessary to lead evidence to prove that the plaintiff claiming specific performance has

financial condition to pay balance amount of consideration.

9. Per contra, learned advocate Mr. Pramod C. Mayure for respondent no.1 would vehemently submit that since this is a Second Appeal this Court cannot enter into the realm of facts which have been concurrently held to have been proved by the courts below. They have taken a reasonable and plausible view of the evidence that was available before them. Going by the wording of the agreement, the specific performance was to be had before a stipulated day else the appellant had undertaken a liability to pay interest @ 12% per annum. No steps were taken either before that day or immediately thereafter to disclose his intention to seek specific performance. He allowed the time to lapse. There was no evidence to demonstrate that he was having financial capacity to pay the remainder of the consideration except his bald statement. All these facts and circumstances were considered by the courts below while recording a concurrent finding that he had failed to prove that he was ready and willing to perform his part under the agreement as is contemplated under Section 16 of the Specific relief Act. Though the agreement stood proved, that would not automatically make him entitle to claim specific performance unless he was able to show his readiness and willingness to get the sale-deed executed. Since the concurrent

findings in this respect are based on clear and reasonable appreciation of the evidence on record, no substantial question of law arises for determination by this Court.

10. I have carefully considered the rival submissions and perused the record. Obviously, both the courts below having upheld the fact that the respondents agreed to sell the suit property to the appellant for the consideration and executed the registered agreement of sale by receiving the earnest money, apart from the fact that the respondents did not step into the witness box to deny it, one needs to proceed with the assumption that this finding of the courts below upholding that there was agreement of sale is clearly unassailable. Even the learned advocate for the respondents rightly refrained from making any submissions in this respect.

11. So far as the requirement of complying with the provision of Section 16 of the Specific Relief Act is concerned, obviously the burden was on the appellant to lead sufficient and cogent evidence to demonstrate that since inception he was ready and willing to perform his part under the agreement. Both the courts below have rightly expected him to establish these facts demonstrating his intention.

12. True it is that the courts below have rightly upheld that the suit was within limitation. But, then the finding on the point of issue can hardly be resorted to to appreciate and record a finding as to the readiness and willingness expected by Section 16 to be established. One cannot jump to the conclusion that the appellant was ready and willing merely because the suit was filed within the period of limitation provided therefor.

13. Much emphasize was laid by learned Senior Advocate Mr. Dhorde on the fact that the respondents had agreed to sell the suit property specifically mentioning in their capacity as *karta* of their joint families. According to Mr. Dhorde, this was the reason why the appellant was apprehensive about their title to the suit property and wanted the confusion to be cleared. If some time was lost in ascertaining this fact, no adverse inference should have been drawn against him holding him not to be keen to get the sale-deed executed.

14. However, as has been correctly pointed out by the courts below, during his cross-examination the appellant specifically admitted that he was aware about the fact that the suit property was free from all encumbrances and had agreed to purchase it because he

was sure that the suit property was having a clear and marketable title and even the respondents assured him about it. These replies of the appellant clearly demonstrate that the excuse for not getting the sale-deed executed promptly is not factually tenable. Since it is a finding of fact based on correct appreciation of the evidence concurred by the courts below, this Court cannot undertake a further scrutiny to ascertain if the finding is borne out from the evidence.

15. Still, if one decides to undertake such a scrutiny, there are few other circumstances apparently skipped by the courts below which would justify their inference and the conclusion that the appellant was not ready and willing to perform his part of the contract.

16. As can be seen from the wording of the agreement about which there is absolutely no dispute, one of the conditions was that the sale-deed was to be registered by 24-12-2004. It was specifically mentioned that it was to be an important condition of the agreement. It specifically recites that for any reason whatsoever if the appellant was not able to complete the transaction he would pay to the respondents interest @ 12% per annum on the remainder of the consideration amount from 24-12-2004, as damages. Conspicuously,

this condition mentions that this liability of the appellant would be irrespective of the actual cause for the delay in getting the sale-deed executed. When, admittedly, the appellant had never positively demonstrated by calling upon the respondents to get the sale-deed executed before 24-12-2004 or soon thereafter, though he published several notices and replies after several months, at no point of time did he make it clear in these notices and replies that in terms of this condition in the agreement, he was ready and willing to pay the interest component. If really he was ready and willing to get the sale-deed executed and was calling upon the respondents to do that, he should have expressly disclosed his intention to pay the interest as was agreed. But neither in the notice nor even in the examination-in-chief did he come with any such express statement. On the contrary, in para no.6 of his examination-in-chief he specifically refuted his liability to pay the interest. If such is the state-of-affairs, certainly this would be an additional circumstance, though not referred to by the courts below, which would justify their inference that the appellant was not ready and willing to perform his part of the contract.

17. True it is that the lower appellate court has not correctly interpreted this clause and has apparently increased the rate of future

interest awarded by the trial court @ 6% per annum to 12 % per annum in ignorance of the fact that the liability to pay the interest was only foisted on the appellant and in no case the respondents were made liable to pay it. But since they have not preferred any appeal to the extent of that direction one need not examine that aspect. Same, this is a circumstance which clearly belies the stand of the appellant of being ever ready and willing to perform his part of the contract.

18. True it is that a party seeking specific performance of an agreement to purchase a property need not strictly prove that he possesses sufficient resources to pay the balance amount of consideration, still, there ought to have been at least some attempt on the part of the appellant to prove that he was having sufficient income or assets to pay all the remainder consideration of more than Rs.30,00,000/-. Except his bald statement he did not lead any evidence to demonstrate this fact. Even in the matter of **Bhavyanath** (surpa), the Supreme Court had undertaken an exercise to decipher the material on the record to demonstrate as to how the evidence was led in respect of the plaintiff's assets sufficient enough to pay the balance amount of consideration. Therefore, strictly speaking the appellant is not entitled to reap any benefit from this decision.

19. No substantial question of law arises in the Second Appeal and it is dismissed with costs.

20. Learned Senior Advocate Mr. Dhorde for the appellant submits that since the execution of the judgment and decree was stayed pending the matter before the lower appellate court, which was decided on 03-12-2021, the relief may be continued for a reasonable period to enable the appellant to approach the Supreme Court.

21. Execution of the decree shall stand stayed for a period of four weeks from today.

22. In view of disposal of the Second Appeal, nothing survives for consideration in the pending Civil Application No.3587 of 2022 and the same stands disposed of.

(MANGESH S. PATIL)
JUDGE

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