

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

SECOND APPEAL NO.102 OF 2022

Shri Dhananjay s/o Wasudeo Dixit and another
Vs.

Shri Kumar s/o Wamanrao Dumbhare and another

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

Court's or Judge's orders

Mr. Abhijeet Khare, Advocate for appellants.
Mr. M. R. Joharapurkar, Advocate for respondent no.1.

CORAM : AVINASH G. GHAROTE, J.

DATE : 05/09/2022

1. Heard Mr. Khare, learned counsel for the appellants and Mr. Joharapurkar, learned counsel for the respondent no.1.

2. This Court by an order dated 4.4.2022 had framed the following substantial questions of law:

“1. Whether both the courts below were right in holding that plaintiffs could not prove their readiness and willingness to perform their part of contract even when it is held in favour of plaintiffs that time was not the essence of contract ?

2. Whether both the courts below were right in holding that plaintiffs were not ready and willing to perform their part of contract even when Exh.-47 clearly shows that they already had a sanctioned loan for purchase of house property ?”

3. It is contended by Mr. Khare, learned counsel for the appellants, that since the only issue revolves around the readiness and willingness of the plaintiffs/appellants in performing his part of the contract, the findings by the Courts below are vitiated on the ground that for the purpose of proving readiness and willingness it is not necessary in law, to be ready with a scheme for financing the transaction or with ready money in pocket. Even otherwise, he submits that in September 2008, itself the appellant no.2 had already applied for a loan to the HDFC Bank along with his wife and a loan of Rs.10,25,000/- was already sanctioned, which is reflected from Exh.47 (pg.140). He therefore submits, that both the Courts below in ignoring the nature of the requirement to prove readiness and willingness in view of Exh.47 have clearly erred in answering the issue against the appellants/plaintiffs. It is further contended, that since the suit property was mortgaged to the IDBI Bank by the respondents, it was necessary for the respondents to clear the mortgage in order to pass clear title to the appellants which having not being done and there being no time frame fixed in the agreement for concluding the contract, the findings of the Courts below in respect of the readiness and willingness stands vitiated.

4. Mr. Joharapurkar, learned counsel for the respondent no.1 submits, that the agreement in question

was in fact a nominal document executed as a security for the loan of Rs.7,00,000/- advanced by the appellants to the respondents. He therefore submits, that even presuming otherwise, it was for the appellants to have made available the balance consideration to the respondents so that the respondents could have paid off the loan to the IDBI Bank. That having not being done the findings in regard to absence of readiness and willingness by the appellants/plaintiffs, clearly stand justified.

5. A perusal of the judgment of the learned trial Court dated 26.4.2019 indicates, that the issue regarding the existence of the agreement of sale dated 8.3.2008 for the total consideration of Rs.13,50,000/- and receipt of part consideration by the respondents of Rs.7,00,000/-, has been answered in the affirmative by both the Courts below. So also, the issue raised in defence that the transaction was a loan transaction, has been answered in the negative by the Courts below. The only ground on which specific performance has been refused is the absence of readiness and willingness on part of the plaintiffs to pay the balance of consideration of Rs.6,50,000/-. Admittedly, there is no time limit fixed in the agreement dated 8.3.2008. Exh.47 (pg. 140) indicates that loan of Rs.10,25,000/- was sanctioned jointly in the name of appellant no.2 Vaibhav Wasudeo Dixit and his wife Apurva Vaibhav Dixit by the HDFC

Bank on 26.9.2008, which was a housing loan. That apart, a perusal of the agreement in question would indicate that in clause 9, the respondents had disclosed the mortgage of the suit property with the IDBI Bank against the loan taken by them and further an undertaking to clear/to pay all the outstanding loan/charges against the apartment before the sale deed and to execute and register the sale deed free from all encumbrances. The existence of this clause would naturally indicate that it was the obligation on part of the respondents to have cleared off the mortgage from IDBI Bank and given an intimation to the appellants of such a clearance and indicated that the property was then clear of the mortgage and the respondents were in a position to transfer a clear title to the appellants/plaintiffs. This however has never been done. The contention by Mr. Joharapurkar, learned counsel for the respondent no.1, that there was total inaction on part of the appellants from 2008 to 2011 when on 6.7.2011 for the first time a notice was issued by the plaintiffs/appellants expressing their readiness and willingness to pay the balance consideration and execute the sale deed after obtaining no due certificate from the IDBI Bank, which adversely reflects upon the readiness and willingness of the appellants, and therefore the Courts below were justified in rendering a finding to this effect, in my considered opinion, is not correct, as it is the settled position of law, that it is not necessary for a

proposed purchaser to have a ready scheme of finance for the transaction in question. The readiness and willingness in the instance case, is clearly reflected from the averments as contained in paras 5, 5(a), 7 and 8 of the plaint, which position as indicated above is supported by Exh.47. It is therefore apparent, that the test of readiness and willingness stood duly satisfied by the appellants by virtue of the averments in the plaint coupled with Exh 47. The findings in paras 23 to 25 of the judgment of the learned trial Court is based upon an incorrect perception of Exh. 47, as it has decided the issue of readiness and willingness against the appellants on the ground that Exh.47 according to him, was issued in the name of the wife of plaintiff no.2 and not to the plaintiff no.2, which however, on a perusal of Exh.47 (pg.140) indicates that it is jointly addressed to the plaintiff no.2 as well as his wife.

6. Though, it is contended by Mr. Joharapurkar, learned counsel for the respondent no.1 that Exh 47 does not indicate that loan was granted for the purchase of the suit property, even if Exh. 47 is ignored, since the law does not mandate that the purchaser should come with ready money in his pockets or fully financed scheme for the transaction, to demonstrate readiness and willingness, mere non mention of the suit property in Exh. 47 would not detract from the readiness and willingness of the appellants in this matter, as that stage

would arise only after the respondents/defendants had cleared the mortgage with the IDBI Bank and sent an intimation to the plaintiffs/appellants which was never done in the instant matter.

7. It is also material to note, that in the reply dated 11.7.2011 sent by the respondent no.1, in pursuance to the notice dated 6.7.2011 by the appellants, in para 2 thereof, there is a categorical admission that after negotiations the respondent no.1 had executed an agreement to sell the flat for valuable consideration of Rs.13,50,000/- and also para 3 thereof admitted the receipt of the part consideration of Rs.7,00,000/-. That being the position, the Courts below have rightly rejected the plea put forth by the respondents that the transaction was of a nominal nature for the security of an alleged loan.

8. In light of the above discussion, it is apparent, that the Courts below have incorrectly held that the appellants were not ready and willing to perform their part of the contract. That being the only ground on which specific performance of the agreement dated 8.3.2008 has been refused, the said finding is hereby quashed and set aside and the suit for specific performance of the agreement dated 8.3.2008, as filed by the appellants stands decreed. Hence, the following order.

ORDER

(i) The respondent no.1 shall execute the sale deed of the suit property in favour of the appellants/plaintiffs, within a period of 30 days from today, after clearing the mortgage by the IDBI Bank.

(ii) The appellants shall deposit the balance consideration with simple interest thereupon at @ 9 % per annum within a period of two weeks from today, in case it is not already deposited earlier.

(iii) In case the sale deed is not so executed and registered, at the expense of the appellants within the aforesaid time, the appellants will be entitled to get it executed and registered through the process of the Court by filing execution proceedings.

(iv) It is made clear, that if the amount is not deposited within the aforesaid period, if not deposited earlier the suit for specific performance shall stand dismissed and the decree passed by the Courts below shall stand.

JUDGE