

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

SECOND APPEAL NO. 199/2019

Gulab s/o Ukundrao Madane,
Aged about 47 yrs, Occ: Auto Driver
R/o: Plot No. 65, Thaore Colony,
New Subhedar Layout, Nagpur-440024.
Ori. Defendant

..... Appellant

// VERSUS //

Vilas s/o Damaji Gaikwad
Aged about 49 yrs, Occ: Private
R/o: Plot No. 15, Durga Nagar,
Manewada Road, Nagpur
Ori. Plaintiff

.... Respondent

Mr. J.M. Gandhi, Advocate for the appellant
Mr. M.R. Joharapurkar, Advocate for the respondent

CORAM : AVINASH G. GHAROTE, J.

DATED : 27/09/2022

ORAL JUDGMENT :

Heard. Admit.

2. The parties were substantially heard on 22.09.2022, on which date, I had recorded the submissions from the parties as under:

“Heard Mr. Gandhi, learned counsel for the appellant and Mr. Joharapurkar, learned counsel for the respondent.

2. On 06.08.2019, while issuing notice the following substantial question of law was framed:

“Whether suit filed for specific performance of contract was barred by limitation?”

3. Mr. Gandhi, learned counsel for the appellant submits, that a further question arises as to the readiness and willingness on part of the plaintiff, since there is no material on record as required by law to demonstrate that, considering which, the following additional substantial questions of law are framed:

“1. Whether the position on record indicates that the plaintiff/respondent was ready and willing to perform his part of the contract in terms of Section 16(c) of the Specific Relief Act?

2. Whether the conduct of the plaintiff, in claiming that the cheque of Rs. 50,000/- given under the agreement was received back and a cash amount of Rs. 50,000/- was paid, as against it, merited a finding by the Courts below?”

4. I have heard the learned counsels for the respective parties on the aforesaid substantial questions of law finally at the stage of admission itself. The learned trial Court has decreed the suit for specific performance and the appellate Court has dismissed the appeal.

5. The agreement of sale in question is dated 11.02.2006 (Exh. 25) in respect of Plot No. 65 and the house constructed thereupon, which was agreed to be sold for a total consideration of Rs. 6,75,000/-. It is claimed, that on the date of agreement itself Rs. 50,000/- was paid in cash and Rs. 50,000/- by cheque, leaving the balance amount payable of Rs. 5,75,000/-, which was agreed to be paid on the date of execution and registration of the sale deed. The cheque for Rs. 50,000/- admittedly has not been presented and it is claimed by the plaintiff/respondent, that the same was taken back and Rs. 50,000/- in cash was paid in lieu thereof subsequent in point of time. The agreement specified a period of 6 months for execution and registration of the sale deed, which would work out as 11.08.2006. It is submitted, that an agreement was executed on 11.08.2006 (Exh. 26) extending the time period to 11.02.2007. On 26.11.2007, a notice (Exh. 27) was issued by the plaintiff to the original vendor Mr.

Ukandrao Madne, which is not served as it was not claimed (Exh. 28). Another notice (Exh. 30) was given on 31.08.2009, which was also not claimed. The suit has been filed on 09.10.2009.

6. *Mr. Gandhi, learned counsel for the appellant, raises an additional ground, in addition to the questions framed above, that since the property in question was situated in a layout of the Co-Operative Society, the provision of Section 91 of the Maharashtra Co-operative Societies Act, 1960 (for short "M.C.S. Act") would be attracted and a dispute under Section 91 of the M.C.S. Act would lie. I am afraid, I am not able to accept this contention for the reason, that even if the property is situated in the layout of a Society, this is not a dispute, which can be said to be covered by the language of Section 91 of the M.C.S. Act, as the plaintiff, is not the member of the Society nor is a person claiming against the Society through its member. The claim is purely for specific performance of the agreement dated 11.02.2006, which under Section 9 of the Code of Civil Procedure would lie before the Civil Court. The contention is therefore rejected.*

7. *Insofar as the substantial question of law framed regarding limitation, it would be material to note, that the agreement dated 11.02.2006 contains a time period of 6 months in which it was to be performed, which fixed the date as 11.08.2006. By an agreement dated 11.08.2006, the period was extended to 11.02.2007. The suit has been filed on 09.10.2009, which is within the period of 3 years from 11.02.2007 the date fixed, considering which, in view of the first part of the Article 54 of the Limitation Act, the suit cannot be held to be barred by limitation. The substantial question of law framed in this regard, is therefore answered in the negative.*

8. *Insofar as the question of readiness and willingness is concerned, both the Courts below have held, that the plaintiff is ready and willing. In this respect, Mr. Gandhi, learned counsel for the appellant submits, that the plea of taking back the cheque of Rs. 50,000/-, claimed to have been given under the agreement dated 11.02.2006 in lieu of which Rs. 50,000/- is claimed to be paid in cash, has not been proved, inasmuch as, the notice at Exh. 27, does not contain the date on which such payment is supposed to*

have been made, in whose presence. He further points out, that the second notice dated 31.08.2009 at Exh. 30 infact does not contain this averment at all but merely states, that the amount of Rs. 50,000/- has been paid by cheque. It is further contended, that even the plaint averments in that regard (para 3) are silent about the date on which the cheque is taken back and the amount of Rs. 50,000/- was paid nor does it specify in whose presence the same was paid. It is therefore contended, that the evidence of PW-2 Shekhar Vitthalrao Gujar (page 74), the attesting witness, who claims that this amount was paid before him, in absence of such an averment in the pleadings, would not be acceptable in law. He therefore submits, that this plea of receiving back the cheque and making payment in cash in lieu thereof is a false plea which has been taken and tried to be proved in evidence, which conduct, disentitles the plaintiff from the discretion under Section 20 of the Specific Relief Act, for which reliance is placed upon **Lakshmi Sreenivasa Co-operative Building Society Vs. Puvvada Rama (Dead) by LRs. and others, AIR 2018 SC 3580 (paras 14 to 17)**.

9. He further submits, that except an averment regarding readiness and willingness, there is no other material placed on record by the plaintiff/respondent, to demonstrate his readiness and willingness. He therefore submits, that the requirement of Section 16(c) of the Specific Relief Act, has not been complied with and the findings as recorded by the Courts below in this regard are without any evidence whatsoever, and therefore, cannot be sustained, for which reliance is placed upon **C.S. Venkatesh Vs. A.S.C. Murthy, (2020) 3 SCC 280 (paras 13 to 16)**.

10. A further plea is raised, that there is a substantial delay in filing the suit of about two and half years, which again disentitles the plaintiff from grant of specific performance, for which reliance is placed upon **K.S. Vidyanadam and others Vs. Vairavan, 1997(2) Mh.L.J. 642 (para 10 and 13)**. He therefore submits, that the Second Appeal needs to be allowed.

11. Mr. Joharapurkar, learned counsel for the respondent submits, that the question of readiness and willingness, has rightly been answered by the Courts below, considering the

averments of the plaintiff in two notices at Exhs. 27 and 30, the averment in the plaint and the affidavit in lieu of evidence.

*12. He further submits, that the evidence of PW-2/Shekhar, is sufficient to demonstrate the payment of Rs. 50,000/- in cash in lieu of the cheque of the same amount. He therefore submits, that the Courts below have rightly held the payment to have been paid. He however states, that there is an endorsement on the agreement at Exh. 25, to demonstrate the payment of the amount of Rs. 50,000/- in cash in lieu of the cheque and seeks a days time to verify this position from the original, considering which, list the matter on **27.09.2022.**”*

3. Today, Mr. Joharapurkar, learned Counsel for the respondent/plaintiff, upon instructions, makes a statement that there is no endorsement on the Agreement at Exh. 25 to demonstrate the payment of Rs.50,000/-, in cash, in lieu of the cheque as enumerated in the Agreement dated 11.02.2006 (Exh. 25), which is claimed to have been taken back by the plaintiff in view of which the cash amount of Rs.50,000/- is claimed to have been paid to the defendant. It is thus apparent, that even the payment of part consideration of Rs.1,00,000/- as indicated in the Agreement dated 11.2.2006 (Exh. 25), has not been proved on record in the absence of proof of payment of Rs.50,000/- in cash, in lieu of cheque as mentioned in the Agreement. That apart, as held in **C.S. Venkatesh** (supra) by the Hon'ble Apex Court, the requirement of Section 16(c) of the Specific Relief Act, 1963 (for short the “Act of 1963”), the proof of the readiness and willingness has to be

demonstrated by the plaintiff, by pleading and establishing by evidence the availability of sufficient funds, to make payment in terms of the contract in time. Perusal of the evidence of the plaintiff in this regard, indicates, that there is total lack of any material in this regard which would indicate the absence of any proof to establish the requirement of readiness and willingness as per Section 16(c) of the Act of 1963. Though, it is contended that the Courts below have rendered concurrent finding regarding the readiness and willingness and it ought not be interfered in the second appeal, however, when such finding, is based upon no evidence at all, as is indicated from the perusal of the evidence of the plaintiff on record which fails in the requirement of Section 16(c) of the Act of 1963, such finding cannot be sustained in law [*see Ravi Setia vs Madan Lal ors., (2019) 9 SCC 381 (paras 10 and 15)*]. This being the position, the question of readiness and willingness, on the part of the plaintiff/respondent will have to be answered in negative, considering which, the impugned judgments, cannot be sustained. They are, therefore, quashed and set aside and the suit for specific performance as filed by the plaintiff is thereby decreed for refund of the part consideration and it is directed that appellant/original defendant shall refund an amount of Rs.50,000/- to the respondent/original plaintiff, from the date of receipt till realization with interest at the rate of 6% per annum for the aforesaid duration.

4. Accordingly, the second appeal is disposed of. No costs.
5. Pending civil application, if any, is also disposed of.

JUDGE

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