

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

SECOND APPEAL NO. 294 OF 2022

APPELLANT: Shri Yadav Domaji Zodape,
Org.Deft aged about 73 years, Occ. Retired,
R/o. Quarter No. 3/5, 58 MIG Colony,
Vaishali Nagar, Nagpur.

...VERSUS...

RESPONDENTS: Smt. Vansheela Bhimrao Sarode
Org.Plfff aged about 52 years, Occ. Private,
R/o. Shatabdi Nagar, Rameshwari Ring Road,
Nagpur.

Shri M.R.Joharapurkar, Advocate for the appellant.
Mr. P.S.Varma, Advocate for respondent

CORAM : AVINASH G. GHAROTE, J.
DATE : 19/09/2022.

1] Heard Mr. Joharapurkar, learned counsel for the appellant and Mr. Verma, learned counsel for the respondent.

2] The learned trial Court by its judgment and decree dated 12.3.2020, passed in Regular Civil Suit No. 2080/2012 has decreed the suit for specific performance directing refund of the earnest amount of ₹.55,000/- with interest at 6% per annum. The learned appellate Court by its judgment and decree dated 4.4.2022 passed in Regular Civil Appeal No. 170/2020 has reversed the

decree of the trial Court, by granting specific performance.

The following substantial questions of law arise for consideration.

1] What is meant by proof of readiness and willingness as contemplated by Section 16(c) of the Specific Relief Act?

2] What are the parameters for exercise of discretion under Section 20 of the Specific Relief Act?

3] The parties are willing to workout the matter finally, considering which the matter is finally heard at the stage of admission itself.

4] Mr. Verma, learned counsel waives for respondent on merits.

5] It is contended by Mr. Joharapurkar, learned counsel for the appellant that though the agreement contemplated the sale deed to be executed within a period of six months time, it expired on 21.1.2009, the balance consideration was not paid, nor the sale deed got executed. It is further contended that a false plea was raised of possession having been delivered under the agreement to the plaintiff. He further submits that in order to prove readiness and

willingness what was required was to place on record the documents for the relevant time i.e. between 22.7.2008 to 21.1.2009, indicating financial capacity of the plaintiff, however the bank statement which is placed on record is of the year 2018, which does not have any bearing on the matter at all. It is further contended that though the defendant/appellant was always ready and willing to execute and register the sale deed upon receipt of the balance consideration, the conduct of the respondent/plaintiff indicates that she was not ready and willing. It is contended that the expression “ready and willing” is something which requires not a mere averment, but also proof of readiness and willingness as is indicated by the language of Section 16(c) of the Specific Relief Act (in short “the SR Act). Reliance is placed upon **C.S. Vyankatesh vs. A.S.C.Murty, [2020] SCCR 411; Kalawati vs. Rakesh Kumar, AIR 2018 SC 960; Pravin D.Thakker Vrs. Rita J. Shah, 2020 (3) Mh.L.J 341; and Dreams Constructions Pvt Ltd vs. Ravindra Kulkarni, 2021 (6) Mh.L.J. 442.**

6] Mr. Verma, learned counsel for the respondent supports the judgment of the learned appellate Court and contends that not only the possession was delivered, but also taxes were being paid of the suit property by the plaintiff, which would add to the readiness

and willingness of the plaintiff. That apart, he submits that a notice was given on 3.2.2010 itself expressing the intention of the plaintiff, to make payment of the balance consideration, however, by the reply dated 13.2.2010, it was wrongly contended that the plaintiff was not ready and willing. He submits that to demonstrate the readiness and willingness, plaintiff has examined himself as PW-1, his daughter Mrs.Shivani Sachin Ingale as PW-2 and Raju Wasudeo Gajbhiye as PW-3. Both PW-2 and PW-3 had averred that they were willing to advance the balance sale consideration to the plaintiff for purchase of the property in question and therefore, the question of readiness and willingness has rightly been answered by the learned appellate Court in favour of the plaintiff.

7] The execution of the agreement dated 22.7.2008 in respect of plot no.6, admeasuring 1,650 sq.ft and the terms contained therein is not disputed. The total consideration was ₹. 5,00,000/-, out of which on the date of the agreement, an amount of ₹.40,000/- stood paid, which is not disputed. A further part consideration of ₹.15,000/- paid on 25.10.2008 is also not disputed. The dispute is regarding the readiness and willingness of the plaintiff and the factum of possession.

8] Taking the factum of possession first, a perusal of the agreement dated 22.7.2008 at Exh.48 [page 13 of the list of document with C.A.(S) No. 833/2022] would indicate that it does not contain any clause regarding delivery of possession before the expiry of the period of six month which was fixed for the execution and registration of the deed of sale. It is contended that the possession of the suit property was delivered by the defendant some time in the year 2009 to the plaintiff. The day and month however are conspicuously absent. It is equally an admitted position that there is no document evidencing delivery of possession whatsoever. Though it is claimed that taxes upon the said property have been paid by the plaintiff from 2009 onwards till today, however, there is nothing brought on record as to on what basis the name of the plaintiff was mutated in the records of the Nagpur Municipal Corporation as well as with M.S.E.D.C.L, so as to enable the plaintiff to pay the corporation taxes or the electricity charges. Though it is contended by Mr. Verma, learned counsel for respondent that this was done at the behest of the appellant/defendant, however, it is not a disputed position that for the purpose of entering the names in the municipal record, there is a necessity of a document of transfer or

‘no objection certificate’ by the owner of the property, and in the instant case, there is no document of transfer admittedly, and so also existence of a ‘no objection certificate’ from the owner has not been brought on record by the plaintiff to indicate that in fact any N.O.C was given for this purpose. Similar is the position in respect of mutation of the name of the plaintiff in the records of the M.S.E.D.C.L. This clearly indicates that without the consent of the defendant, the plaintiff has been able to get his name mutated in the record, which clearly speaks volumes about the conduct of the plaintiff. It is also not the case of the plaintiff that the entire consideration as agreed under the agreement dated 22.7.2008, stood paid to the defendant, as a result of which the possession was handed over and so also the N.O.C was given. It is an admitted position on record that out of entire agreed consideration of ₹.5,00,000/-, ₹. 40,000/- was paid on the date of the agreement and ₹.15,000/- on 25.10.2008, leaving a balance of ₹.4,45,000/- which is a substantial portion of the entire consideration. It is inconceivable that without receiving the balance of the agreed consideration, or a major portion thereof, the defendant would deliver possession of the property in question to the plaintiff. It is in

these circumstances, that it was necessary for the plaintiff to have established by cogent evidence brought on record that there was delivery of possession at the behest of the defendant or 'no objection letter' was granted by the defendant for the purpose of mutating the name of the plaintiff in the record of the N.M.C. as well as M.S.E.D.C.L.

9] In fact, a perusal of the plaint in S.C.S No.2080/2012 which was filed on 4.3.2010, there is no averment whatsoever that the possession of the property in question was delivered to the plaintiff at any point of time. In fact, the prayer clause (i) [page 26 of the suit] specifically claims a decree for possession of the suit premises against the defendant, which would indicate the falsity of the claim by the plaintiff that possession was delivered under the agreement some time in the year 2009. Though a statement is made by Mr. Verma, learned counsel for the respondent that an application under Order 6 Rule 17 of CPC had been filed before the learned trial Court to explain the delivery of possession, the same came to be rejected by the learned trial Court, according to him, which was not challenged, considering which any plea contradictory to what has been stated in the plaint regarding possession, cannot be accepted.

Though the affidavit evidence of the plaintiff at Exh.34 in para 5 contains a statement that possession was handed over, it is a statement as bland as possible, without any day, month or year whatsoever, muchless anytime. Even the officials of the N.M.C. or that of the M.S.E.D.C.L. have not been examined by the plaintiff in order to buttress the contention that the mutation of the name of the plaintiff in the records of the N.M.C as well as M.S.E.D.C.L was on account of the N.O.C. issued by the defendant. This would clearly indicate that the plea of possession having been delivered to the plaintiff under the agreement is clearly false. Though reliance is being sought to be placed upon the cross examination of the defendant by Mr. Verma, learned counsel for the respondent on a statement made therein that the defendant had not given a notice for vacation of the property in question, that at the most would indicate that the plaintiff was in illegal occupation of the property in question, but would not substantiate the plea that the plaintiff was at any point of time placed in possession of the property under the agreement.

10] The exercise of discretion under Section 20 of SR Act is also based upon a requirement that the plaintiff should approach the

Court with clean hands with a full and candid disclosure of the material facts and so also place on record documents relevant to the same. In the instant case, as is apparent from the discussion above, that there is nothing on record to indicate that the plaintiff was ever placed in possession of the property in question under the agreement dated 22.7.2008, which would clearly reflect upon the bonafides of the plaintiff vis-a-vis exercise of discretion under Section 20 of the SR Act.

11] Coming to the question of readiness and willingness, it would be material to note that section 16 (c) of the SR Act requires plaintiff not only to aver but also to prove his readiness and willingness. The expression “to prove”, is not an empty formality, but indicates the requirement to establish by satisfactory evidence (Black Law Dictionary 8th Edition, pg. 1261). In order to establish this, what has been placed on record by the plaintiff in her evidence are the statement of accounts of the plaintiff’s bank at Exh.60 & 61, which admittedly are of July 2018 (cross examination pg 53), which is neither here nor there. Though it has been tried to be brought on record in the evidence that the plaintiff had sold a shop block owned by her to one Silvia Silvester Fernandes on 23.9.2009 for a

consideration of ₹. 65,000/-, that however is merely a statement, as neither the sale deed dated 23.9.2009 nor the bank statement of September 2009 has been placed on record to establish this position. The brother of the plaintiff Mr. Raju Wasudeo Gajbhiye had also been examined at Exh.63 and though a statement was made in his chief that he was ready to assist her financially, nothing has been placed on record by way of documentary evidence to indicate that he was in a financial position to do so in the year 2009. It is thus apparent that the requirement “to prove” readiness and willingness as contained in Section 16 (c) of SR Act, which as indicated above, would mean the establishment of the requirement by sufficient evidence has not been spelt out by the plaintiff in any manner whatsoever.

12] The learned appellate Court appears to have been swayed by the statement made by the plaintiff that she had sold a shop for consideration, which amount was available, for payment without considering the fact that the documents thereof were not brought on record, in view of which the averment merely remained that and nothing else. The learned appellate Court further failed to appreciate that mere statements on behalf of PW-2 and PW-3

without indicating that they were possessed of sufficient means to assist the plaintiff at the relevant time, would also not be of any relevance in determining the readiness and willingness considering the nature and import of Section 16(c) of the SR Act. The readiness and willingness under Section 16 (c) of the SR Act has to be continuous and throughout during the pendency of the suit, which position appears to be absent in the present matter. The Hon'ble Apex Court, in **C.S.Vyankatesh** (supra) has held as under:

“15. The words ‘ready and willing’ imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the Court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his

part of the contract. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.”

Pravin D. Thakker (supra) also holds that to demonstrate readiness and willingness, plaintiff must prove that he/she had financial capacity to go ahead with the transaction. **Dreams Constructions** (supra) also holds the same.

In **Kalawati** (supra), the Hon’ble Apex Court considering the fact that there was no condition in the agreement to the effect that the vendor was required to obtain NOC of any nature whatsoever from the concerned authority, held that the insistence of the plaintiff for the same would indicate absence of readiness and willingness. In the instant matter, a perusal of the agreement dated 22.7.2008 would indicate that there is no such requirement in the agreement. That apart, agreement does not indicate that the property was of such a nature that it requires NOC from any authority, as against which there is a averment in the plaint that the defendant had agreed to bring the NOC from the NIT, the sanction map, the tax receipt as well as the Regularization letter. Had this been the position, the plaintiff would have established on record by leading evidence that the

property in question was of a nature which requires such documents for the execution and registration of the sale deed, however, there is no such evidence forthcoming on record. Thus the plaintiff was insisting for performance of conditions, which were not in the agreement, nor were spelt out as the obligation of the defendant to transfer a clear and marketable title from the evidence on record.

13] All these factors do not appear to have been considered by the learned appellate Court in its impugned judgment. I am therefore constrained to answer both the questions framed in the manner as indicated above, in view of which the impugned judgment of the first appellate Court dated 4.4.2022, passed in RCA No.170/2020 is hereby quashed and set aside and that of the learned trial Court dated 12.3.2020 in RCS No. 2080/12 is hereby restored. The second appeal is allowed. No costs.

JUDGE