

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

**SECOND APPEAL NO. 384 OF 2018
AND
CROSS OBJECTION ST. NO. 18714 OF 2018**

1. Bharat S/o. Devshi Patel
Aged about 59 years, Occ: Business,
2. Tarun S/o. Devshi Patel
Aged about 53 years, Occ: Business,
3. Jitendra S/o. Devshi Patel
Aged about 42 years, Occ: Business,
4. Vijay S/o. Devshi Patel (Since Dead through his LRs.):
 - 4.a Smt. Manjula Wd/o. Vijay Patel,
aged about 47 years, Occupation :
Housewife.
 - 4.b Jay S/o. Vijay Patel,
aged about 24 years, Occupation :
Student,
 - 4.c Ku. Vriti D/o. Vijay Patel,
aged about 17 years, Occupation :
Student, through her guardian mother
i.e. 4-A.
All 1 to 4 (4a to 4c) resident of 21,
Sardar Patel Timber Market, Ghat
Road, Nagpur-3.

.... **APPELLANTS.**
(Org. Plaintiffs)

// VERSUS //

Sou. Vimal Ramchandra Dhore,
aged about 62 years, Occupation :
Housewife, Resident of Tulsibag Road,
Opposite Bhosale Wada, Mahal,
Nagpur.

.... **RESPONDENTS.**
(Org. Defendant)

Shri M.M.Agnihotri, Advocate for Appellants.
Shri B.W.Patil, Advocate for the Respondent.

CORAM : **ANIL S. KILOR, J.**
DATE OF RESERVING THE JUDGMENT : 09/12/2021
DATE OF PRONOUNCING THE JUDGMENT : 07/04/2022

JUDGMENT :

1. The challenge raised in the this appeal is to the judgment and decree dated 22/03/2018 passed by District Judge-14 and Additional Sessions Judge, Nagpur in Regular Civil Appeal No.444 of 2014 thereby partly allowing the appeal, however, refusing the relief of specific performance of contract, filed by the plaintiffs and setting aside the judgment and decree dated

24/07/2014 passed by 2nd Joint Civil Judge, Junior Division, Nagpur in Regular Civil Suit No.921/2012, dismissing the suit for specific performance of contract.

2. The facts in brief are as under: (The parties are referred as per their status before the trial Court):

It is the case of the plaintiffs that the agricultural land bearing Khasra No.88/2, 89, New No.56/1, Mouza: Ruikhairi, admeasuring about 4000 Sq.Mtrs. is the suit property.

3. It is further submitted that the plaintiffs and the defendant agreed as per the agreement of sale dated 19/10/2003, to sell the suit property to the plaintiffs for the total consideration of Rs.4,61,000/- with further agreement to execute the sale deed on or before 30/06/2004. On 19/10/2003 an amount of Rs.11,000/- was paid by cash while Rs.1,50,000/- was paid by cheque.

4. Thereafter, on 12/02/2004 two cheques of Rs.50,000/- each were given to the defendant. Then on 09/03/2004 four cheques of Rs.25,000/- each were given to the defendant. The defendant acknowledged receipt of such amount by executing a stamp paper dated 08/03/2004. It is submitted that the plaintiffs paid Rs.3,61,000/ to the defendant from time to time up to 09/03/2004.

5. It is further submitted by the plaintiffs that they approached the defendant and requested her to execute sale deed on or before 30/06/2004, but the defendant avoided the same. The plaintiffs were ready to pay balance consideration amount of Rs.1,00,000/-. They issued a letter dated 10/05/2004 requesting the defendant to execute the sale-deed. Since it was not replied, another request letter dated 12/06/2004 was sent. The same was refused, hence, again on 25/06/2004 the plaintiffs sent a letter asking the defendant to execute the sale-deed. They also informed that if the sale-deed was not executed on 30/06/2004 the time would be automatically extended. Thereafter on 01/01/2005 the

plaintiffs again requested for execution of sale-deed. The defendant deliberately avoided to execute sale-deed. The plaintiffs then issued legal notice on 29.10.2005 sent on 31.10.2005, but in the meantime the defendant sent a letter dated 02/11/2005 putting up a story of hand loan transaction and execution of agreement towards security of its repayment. The plaintiffs denied such case of the defendant. Therefore, contending readiness and willingness to pay the balance consideration amount, the plaintiffs filed the suit for specific performance of contract and alternatively prayed for refund of Rs.3,61,000/- with interest.

6. The defendant filed written statement at Exh.11 and categorically denied the theory of the plaintiff about agreement of sale. The defendant categorically denied all the contentions of the plaintiffs. According to the defendant, she had agreed to sell 2000 Sq.Mts. of land in the year 1996 for the consideration of Rs.4,91,000/- and therefore, it was improbable that, she would agree to sell the land for half the rate in the year 2003 for 4000 Sq. Mts. of land.

7. According to the defendant, only the land to the extent of 3100 Sq.Mts. was remaining and hence, there was no reason to execute agreement of sale of the land of 4000 Sq.Mts. The defendant had accepted the amount of Rs.3,50,000/- for the purpose of marriage of her daughter. She was ready to return such amount. The agreement was executed for security of such hand loan. The hand loan was to be repaid till 31/05/2004. The defendant's son and husband on 15/09/2004 approached the plaintiffs to return the loan amount of Rs.3,50,000/- but the plaintiffs refused the same. Same episode happened on 27/03/2005 and on 27/10/2005. The plaintiffs refused to hand over the stamp papers kept as security. On 05/05/2004 a letter was sent by the defendant making it clear about the hand loan transaction.

8. It is submitted by the plaintiffs that the defendant sent a reply notice on 17/11/2005 annexing thereto the letter dated 02/11/2005. The plaintiffs were carrying the business of saw mill,

while the son of defendant was in furniture business and hence, there were cordial relations between them.

9. The trial Court after scrutinizing the oral as well as documentary evidence was pleased to dismiss the suit for specific performance of the contract by holding that the agreement executed was by way of security of hand loan of Rs.3,50,000/- and accordingly, the defendant was directed to pay such amount with interest @ 7% per annum vide judgment and decree dated 28/07/2014 passed in Regular Civil Suit No. 921 of 2012.

10. Feeling aggrieved by the said judgment and decree the plaintiffs carried appeal before the District Judge, Nagpur vide Regular Civil Appeal No. 444 of 2014, which came to be partly allowed vide impugned judgment and decree dated 22/03/2018 and thereby the relief of specific performance of contract was refused and the defendant was directed to pay to the plaintiff an amount of Rs.3,61,000/-. The said judgment and decree is assailed in the present appeal.

11. This Court on July 27, 2018, had framed the following substantial question of law :

“The Appellate Court having held that the agreement at Exhibit 29 was proved to be an agreement of sale, whether the refusal to pass a decree for specific performance is based on evidence on record?”

Subsequently, on 3rd December 2021 this Court framed additional substantial questions of law namely :

- “(i) What would be the effect of acquisition of suit land by NHAI on the present suit for specific performance ?*
- (ii) Whether the findings recorded by the learned lower appellate Court that the agreement dated 19th October 2003 Exhibit 29 is a money lending transaction as claimed by defendant, is perverse and without any evidence?”*

12. I have heard the learned counsel for the respective parties.

13. Shri Agnihotri, learned counsel for the appellants submits that the expression ‘readiness and willingness’ has been dealt by the Hon’ble Apex Court in various judgments and it has been held that while examining the question as to how and in what

manner the plaintiff is required to prove his financial readiness so as to enable him to claim specific performance of the contract, it is held that it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing the transaction to prove his readiness and willingness. He thus submits that though the plaintiffs have proved and established that they were ready and willing to perform their part of the contract, the learned lower appellate Court has held against the plaintiffs and the learned trial Court has held that the said issue does not survive. To substantiate his argument, the learned counsel for the appellants has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of *A. Kanthamani ..vs.. Nasreen Ahmed*,¹.

14. It is further submitted that the requirement of Section 16(c) of the specific Relief Act, 1963, is that by averments made it should be conveyed to the defendant that the plaintiff has performed essential terms of the contract or has always been ready and willing to perform his part of the contract. It is submitted that

¹ (2017) 4 SCC 654

the above referred well settled principles of law has not been taken into consideration by the learned First Appellate Court while holding against the plaintiffs on the point of readiness and willingness. To buttress his submission he has placed reliance on the judgment in the case of *Shaligram ..vs. Ramesh*².

15. It is further submitted that out of total consideration of Rs.3,50,000/- the plaintiffs had paid Rs.2,50,000/- and Rs.1,00,000/- was balance. Thus, the major portion of consideration, 2/3 portion was paid by the plaintiffs and so the willingness to pay the remaining amount was apparent. For this purpose, Shri Agnihotri, learned counsel for the plaintiffs, has placed reliance on a judgment of coordinate Bench of this Court in the case of *Kashinath .vs..Osman Baig*³.

16. Shri Agnihotri learned counsel for the appellants further argues that when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read

² 2014(3) Mh.L.J. 704

³ 2016(4) Mh.L.J. 538

the document properly and understood it and only then he has affixed his signature thereon, otherwise, no signature on a document can ever be accepted. It is submitted that in this case the learned first appellate Court though held that there was an agreement of sale between the plaintiffs and the defendant dated 19/10/2003 and the plaintiffs paid Rs.3,61,000/- to the defendant towards part consideration amount, a relief of specific performance has not been granted. The learned counsel for the appellants has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of *Grasim Industries Ltd., ..vs.. Agrawal Steel*⁴.

17. Shri Agnihotri learned counsel for the appellants has pointed out that in this case, the land has now been acquired by NHAI and therefore, the plaintiffs are entitled in such event for a modified alternative decree. For this purpose he has placed reliance on a judgments of the Hon'ble Supreme Court of India in the case

of *Jagdish Singh..vs..Natthu Singh*⁵ *Urmila Devi..vs.. Mandir Shree Chamunda Devi*⁶ and *Sukhbir ..vs.. Ajit Singh*⁷.

18. On the other hand the learned counsel for the defendant supports the impugned judgment and decree passed by both the Courts below and submits that both the Courts below have given concurrent findings of fact that the appellant failed to prove that they were ready and willing to perform their part of contract. It is submitted that there is no perversity committed by both the Courts below in recording the above referred findings of fact and therefore, in Second Appeal this Court may not disturb the said findings only because the some other view is possible. The learned counsel for the defendant relies upon the judgment of this Court in the case of *Mahadu Ayaji Ingole & Ors. .vs. Mohd. Javed Haji Umardaraj Malavi*⁸ on the point of limitation.

5 (1992) 1 SCC 647

6 (2018) 2 SCC 284

7 (2021) 6 SCC 54

8 2019 NearLaw (BombayHC Nagpur) Online 614

19. It is submitted that while exercising discretion in a suit for specific performance the Courts should bear in mind that when the parties described a time, period for taking certain steps or for completion of the transaction, that must have some significance and therefore, time prescribed cannot be ignored. It is further submitted that the Courts shall apply greater scrutiny and strictness when considering whether the purchaser is ready and willing to perform his part of the contract.

20. Having heard the learned counsel for the parties and on perusal of the record of the case, I proceed to consider the rival contentions of the parties.

21. First, I will examine whether there is any perversity in concurrent findings recorded by both the courts below against the plaintiff / appellant on the point of readiness and willingness.

22. The filing of the suit for specific performance of an agreement/ contract is governed by Section 16(c) of the Specific Relief Act, 1963, which reads thus :

*“16. **Personal bars to relief.** - Specific performance of a contract cannot be enforced in favour of a person -*

(a) - (b)

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.”

23. The Hon’ble Supreme Court of India in the case of *A. Kanthmani* (supra), while interpreting the expression “readiness and willingness”, has observed thus :

“24) The expression "readiness and willingness" has been the subject matter of interpretation in many cases even prior to its insertion in Section 16 (c) of the Specific Relief Act, 1963. While examining the

question as to how and in what manner, the plaintiff is required to prove his financial readiness so as to enable him to claim specific performance of the contract/agreement, the Privy Council in a leading case which arose from the Indian Courts (Bombay) in Bank of India Limited & Ors. Vs. Jamsetji A.H. Chinoy, approved the view taken by Chagla A.C.J., and held inter alia that

"it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing the transaction to prove his readiness and willingness."

25) *The following observations of the Privy Council are apposite: (Jamsetji case, SCC Online PC)*

"... Their Lordships agree with this conclusion and the grounds on which it was based. It is true that the Plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact, and in the present case the Appellate Court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla A.C.J. when he says:

"In my opinion, on the evidence already on record it was sufficient for the court to come

to the conclusion that plaintiff 1 was ready and willing to perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury - if the matter was left to the jury in England - would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from defendants 1 and 2."

For the foregoing reasons, their Lordships answer question(4) in the affirmative."
(Emphasis supplied)

26) This Court in Sukhbir Singh v. Brij Pal Singh followed the aforesaid principle with these words: (SCC p.202, para 5)

"5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub- Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary

that they should always carry the money with them from the date of the suit till the date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law.”

24. Having considered the above referred observations of the Hon’ble Supreme Court of India on the expression “readiness and willingness”, it is clear that while examining the question as to how and in what manner, the plaintiff is required to prove his financial readiness so as to enable him to claim specific performance of the contract / agreement, it is not necessary to produce the money or vouch a concluded scheme for financing the transaction. The question is one of fact and on the basis of evidence on record the Court should draw a conclusion. The nature of proof of readiness and willingness to perform the part of the contract depends on facts and circumstances of each and every case.

25. In the teeth of above referred well settled principles of law on the point of readiness and willingness, I revert back to the facts of the present case.

26. In the case in hand, as per plaintiffs' own story, the date of execution of the sale deed was fixed as 30/06/2004. The plaintiffs, while pleading their case on readiness and willingness, have pleaded in the suit that they issued a letter dated 10/05/2004 by Under Certificate of Posting to the defendant and requested the defendant to execute the sale deed in favour of the plaintiffs, but she did not reply. The plaintiffs again issued letter dated 12/06/2004 and again requested for execution of the sale deed and asked for fresh 7, 7-A and 12 Extracts and other documents for executing the legal and valid sale deed, but the defendant deliberately refused to reply therefor. Again on 25/06/2004 the plaintiffs requested the defendant by giving the previous reference of the letters and it was stated that if the defendant failed to execute the sale deed on or before 30/06/2004 then the limit of execution

for the sale deed shall be extended automatically. The defendant kept mum and hence, the limit is extended. Therefore, on 01/01/2005 the plaintiffs again requested the defendant to execute the sale deed but all in vain. Therefore, at last plaintiffs approached their counsel and issued legal notice dated 26/05/2009 by RPAD which was duly received by the defendant on 07/11/2005 and replied by the defendant.

27. Admittedly, letters dated 10/05/2004, 12/06/2004 and 25/06/2004, none of these letters were produced on record in support of the case of the plaintiffs that before the date fixed for execution of sale deed, to perform their part of contract, they tried to get the sale deed executed by showing their readiness and willingness.

28. The plaintiff has admitted in cross-examination that all these letters were not produced on the record.

29. The learned counsel for the appellants submits that all these letters though, on the date of cross-examination, were not on record, they were filed on record on the next day.

30. Even if the said fact is accepted, there is no dispute that none of the said letters, was proved by the plaintiffs. Merely filing aforesaid letters on record, is not sufficient unless the same are proved. In the circumstances, even if those letters are on record, as argued by the learned counsel for the appellants, it cannot be read in evidence.

31. Moreover, the pleadings show that the letter dated 10/05/2004 was sent by Under Certificate of Posting, which cannot be termed as a valid service. As far as the other letters are concerned, i.e. 12/06/2004 and 25/06/2004, there is no mention whether those were issued through R.P.A.D. or by simple post.

32. Thus, there is no evidence brought on record that the plaintiffs had taken necessary efforts on their part to get the Sale

Deed executed on or before 30/06/2004, by showing their readiness and willingness.

33. The legal notice, which was issued by the plaintiffs, was issued on 29/10/2005 and it was duly received by the defendant on 07/11/2005. This notice was issued through RPAD and the acknowledgment was filed on record as Exh.26-A . This legal notice was issued after 16 months from the date fixed for execution of sale deed.

34. In the pleadings nothing has been pleaded explaining this period from 30/06/2004 till 29/10/2005 except that on 01/01/2005 the plaintiffs requested the defendant to execute the sale deed.

35. There are no pleadings justifying why the plaintiffs waited for 16 months to issue legal notice after the due date of execution of sale deed i.e. 30/06/2004 and for filing of suit after about one and half year.

36. While considering the question, whether the plaintiffs have proved their readiness and willingness, according to me, the above referred facts are significant, in this case.

37. The Coordinate Bench of this Court in a judgment in the case of *Mahadu Ingole* (supra) has held thus :

"7. Several decisions were cited by Shri S.P. Kshirsagar, the learned counsel for the appellant and Shri Tejas Deshapnde, the learned counsel for the respondent. Suffice it to refer to the following observations of the Hon'ble Apex Court in Saradamani Kandappan..vs..S. Rajalakshmi and ors, 2011(12) SCC 18:

"42. Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may."

"43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam:

(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

Re: Question (ii)"

38. Considering the above referred factors discussed in the case of *Mahadu* (supra) the time lapsed between the date fixed for execution of sale deed and date of filing suit is significant and it creates doubt about the case of plaintiffs that they were ready and willing to perform their part of the contract.

39. The Coordinate Bench of this Court in a case of *Kashinath* (supra), by relying upon the judgment of the Hon'ble Supreme Court of India in the case of *Motilal Jain ..vs.. Ramdasi Devi*, reported in **(2000)6 SCC 420**, has held that the major portion of consideration, 2/3 portion was paid at the time of execution of the agreement and so, the willingness to pay the remaining amount was apparent.

40. There is no dispute that in this case the plaintiffs have paid Rs.3,61,000/- out of total consideration of Rs.4,61,000/-, however, in the light of above referred observations the mere fact that the plaintiffs have paid major portion of consideration, it cannot be held that the readiness and willingness to pay remaining amount was apparent in this case.

41. It is a settled law that in every case, it is the duty of the Court to ascertain as to whether the party claiming specific relief was ready and willing to perform his part of the contract.

42. In the above referred backdrop, I am of the considered view that in this case it can safely be held that the appellants have failed to prove that they were ready and willing to perform their part of contract. It can further be safely held that both the Courts below are right in holding concurrently that the plaintiffs have failed to prove readiness and willingness to perform their part of the contract.

43. It is a well settled law that in Second Appeal the High Court should not interfere with the concurrent findings based on appreciation of oral and documentary evidence. In this case, both the Courts below have while giving concurrent findings, recorded the reasons based on appreciation of oral and documentary evidence. In absence of any perversity in recording the concurrent findings by the both the Courts below on readiness and willingness, I do not find any merit in the present appeal.

44. Even otherwise, the admissions given by P.W. 2 in his cross-examination show that there was no negotiation or

discussions held between the plaintiffs and the defendant before entering into the agreement. It has also come in the evidence that the agreement Exh.29 was prepared by plaintiffs and without knowing the contents of the same it was signed by the defendant on the insistence of P.W. 2. The fact that the defendant had no knowledge about the contents of the agreement is sufficient to hold that there was no free will of defendant to enter into the agreement and as such as per the provisions of the Contract Act it cannot be said that it is a valid contract.

45. Be that as it may, in this case, as the plaintiffs failed to prove readiness and willingness there is no need to consider the case of the appellants on the point of alteration of decree in view of the acquisition of the suit land by NHAI.

46. Thus, in the above terms, I have answered the substantial questions of law and pass the following order:

The appeal is **dismissed**. No order as to costs.

The Cross Objection Stamp No. 18714 of 2018 was not argued and pressed, the same is **disposed of**.

Pending application(s), if any, shall stand **disposed of**.

(ANIL S. KILOR, J)

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