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

SECOND APPEAL NO.159 OF 2019

1) Smt.Vipan Rajendrakumar Vaid,
Aged about 57 years, Occ: Household,
R/o : House No.370, Ward No.67,
Kiradpura, Gandhi Chowk, Sadar,
Nagpur.

.... Appellant(s)
(Org. Plaintiff)

// VERSUS //

1) Smt. Champabai Ramprasad Pure,
Aged about 65 years, Occ: Household,
R/o. Timki, Teen Khamba Chowk, Nagpur.

2) Vishal Ramprasad Pure-DEAD
Through his Legal Heirs

(a) Smt. Kamini wd/o Vishal Pure
Aged abt. 35 yrs. Occ. Housewife

(b) Ku. Oshin d/o Vishal Pure
Aged about 10 yrs. Occ. Education

(c) Honey s/o Vishal Pure
Aged about 7 yrs. Occ: Education
Nos.(b) and (c) being minor represented by Natural Guardian mother i.e. respondent No.1.
All R/o: House No.370, Kiradpura, Sadar Bazar, Nagpur.

3) Smt. Namrata Prakash Bundele,
Aged about 52 years, Occ: Nil,
R/o Ranapratapnagar Chowk, Ring Road,
Nagpur.

... Respondent(s)
(Org. Defendants)

Shri J.M. Gandhi, Advocate for the appellant/s
Shri S.S. Sitani, Advocate for the respondent Nos.1 and 2(a) to 2(c)

CORAM : ANIL S. KILOR, J.
DATED : 23th March 2023

ORAL JUDGMENT :

1. Heard.

2. Admit.

3. The present second appeal is arising out of the judgment and the decree dated 06.11.2017 passed by the District Judge-12, Nagpur in Civil Appeal No.154 of 2012, partly allowing the appeal and thereby, confirming the refusal of relief for specific performance of contract vide judgment and decree dated 17.08.2001 passed by the trial Court and thereby, modifying it by directing the defendants to refund the earnest amount of Rs.1,40,000/- to the plaintiff along with interest at the rate of 10 % p.a. from 19.07.1994 till realization of the amount.

4. The brief facts of the present case are as under: (The parties are referred to as per their status before the trial Court)

The defendant Nos.1 to 3 are the owners of house, bearing No.370/0/1 situated in Ward No.67, Kiradpura, Nagpur. The plaintiff's husband is the tenant on the first floor of suit house. The ground floor is in the occupation of another tenant Mr. Satish Parekh. On 19/07/1994, the defendants agreed to sell entire suit house consisting ground floor to the plaintiff on valuable consideration of Rs.4,50,000/-. The defendants have accepted the amount of earnest money Rs.1,40,000/- from the plaintiff. The balance consideration was agreed to be paid at the time of execution of the sale deed. It was agreed to execute the sale deed on or before 18/11/1994. The defendants also agreed to obtain No Objection Certificate (NoC) from Nagpur Improvement Trust (NIT) and Income Tax Clearance Certificate from concern department before executing the sale deed. They had also agreed to deliver the vacant possession of the suit house to the plaintiff.

5. It is further contention of the plaintiff that, she was always ready and willing to perform her part of the contract and repeatedly requested the defendants to perform their terms and turns to execute the sale deed. However, the defendants have avoided for executing the sale deed. Thus, on 16.11.1994 the plaintiff sent telegram to the defendants and called upon them to complete the transaction and also informed that the amount of balance consideration is ready with her. However, the defendants did not respond to the said notice. Thereafter, on 21.11.1994, the plaintiff again sent second notice to the defendants and called upon them to execute the sale deed after complying with the agreed terms. However, the defendants have sent false notice reply and raised false pleas therein. Hence, on 28.11.1994 rejoinder was sent to the defendants but they failed to execute the sale deed. Hence, the plaintiff is constrained to file the suit for specific performance of the contract.

6. The learned trial Court, after examining the oral as well as documentary evidence, dismissed the suit vide judgment and decree dated 17.08.2001 which was carried in appeal. The appeal was partly allowed vide impugned judgment and decree dated 06.11.2017, maintaining the findings in respect of refusal to grant decree of specific performance. However, the decree of the trial Court was modified, directing the defendants to refund the earnest amount of Rs.1,40,000/- to the plaintiff with interest, which is the subject matter of the present appeal.

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

8. This Court, vide order dated 20.09.2019 framed the following substantial questions of law:

> *"(i) Whether the Courts below were justified in holding that the appellant (original plaintiff) was not ready and willing to perform his part of the contract in terms of agreement dated 19.07.1994 (Exh.25) ?*
>
> *(ii) Whether the Courts below correctly appreciated the effect of Exhibits 26, 27, 33 and 35 on the question of readiness and willingness shown by the appellant to perform her part of the contract in the present case ?*

9. The learned counsel for the plaintiff submits that the documents Exhs.26, 27, 33 and 35 are sufficient to establish that the plaintiff was ready and willing to perform her part of contract. It is pointed out that Exh.26 is the copy of Challan of payment of necessary stamp duty issued by the Treasury Officer and Exh.27 is the telegram issued by the plaintiff.

10. The Exh.27 was issued to ask the defendants to remain present for registration of sale deed, on 18.11.1994 along with No

Objection Certificate (NoC) from Nagpur Improvement Trust (NIT) and Income Tax Clearance Certificate.

11. Exhs.33 and 35 are the pay orders dated 17.11.1994 showing that the plaintiff had necessary amount to perform her part of contract. He therefore, submits that findings as regards the readiness and willingness recorded by both the Courts below, are perverse. In support of his submission, he has placed reliance upon the judgments of the Hon'ble Supreme court of India, in the case of ***P.D.'Souza Vs. Shondrilo Naidu***[1], ***Sughar Singh Vs. Hari Singh (Dead) Through Lrs. & Ors.***[2] ***Satya Jain Vs. Anis Ahmed Rushdie***[3] ***M/s. J.P. Builders & Anr. Vs. A. Ramdas Rao & Anr.***[4], ***Leeladhar (D) Thr. Lrs. v. Vijay Kumar (D) Thr. LRs. and Ors.***[5] and ***R. Lakshmikantham Vs. Devaraji***[6].

12. It is a settled law that merely the delay in filing suit after accrual of cause of action cannot be inferred against the plaintiff that he was not ready and willing to perform his part, if the suit was

1 2005(5) ALL MR (S.C.) 15
2 Civil Appeal No.5110 of 2021, dt. 26.10.2021
3 2013(1) ALL MR 433 (S.C.)
4 2011 (5) ALL MR 899 (S.C.)
5 AIR 2019 Supreme Court 4652
6 (2019) 8 Supreme Court Cases 62

filed within a period of limitation. He therefore, submits that both the Courts below have wrongly held against the plaintiff on the ground that the suit was filed after two years. For this purpose, he has placed reliance upon the judgment of the Hon'ble Supreme Court of India in the case of ***R. Lakshmikantham Vs. Devaraji***[7].

13. The learned counsel for the plaintiff points out that in the agreement, there were clauses namely, the defendants will obtain No Objection Certificate (NoC) from the NIT and also obtain Income Tax Clearance Certificate before the date of execution of sale deed. In addition, a clause was also there in respect of handing over vacant possession of the suit premises, as a tenant was there. It is submitted that, at no point of time the defendants informed that they have obtained the NoC, Income Tax Clearance Certificate or got the premises vacated from the tenant. He therefore, submits that the defendants failed to perform their part of contract and as both the Courts below have ignored the said material fact, the impugned judgment and decree, is erroneous and liable to be quashed and set aside.

7 (2019) 8 Supreme Court Cases 62

14. On the other hand, the learned counsel for the defendants opposed the appeal and submits that the suit for specific performance of contract, without prayer to set aside the cancellation of the sale deed, is not maintainable. It is submitted that, even after repeated requests made by the defendants to get the sale deed executed and on failure of the plaintiff to get the sale deed executed, the defendants cancelled the sale deed. However, there is no prayer is made by the plaintiff for setting aside said cancellation of agreement. Hence, the simplicitor suit for specific performance, is not maintainable. For this purpose, he has placed reliance upon the judgment of the Hon'ble Supreme court of India in the case of ***I.S. Sikandar (Dead) By Lrs. Vs. K. Subramani and others***[8]

15. The learned counsel for the defendants submits that, the NoC from the NIT was obtained in the month of September 1994, much before the date fixed for the execution of the sale deed. It is further submitted that, the Income Tax Clearance Certificate was not necessary as opined by the advocate and both the facts were communicated to the plaintiff by the telegram issued on 18.11.1994.

8 (2013) 15 Supreme Court Cases 27

16. It is submitted that the plaintiff was asked to remain present at 11.00 a.m. on 19.11.1994 before the Sub Registrar for execution of sale deed and accordingly, the document Exh. 39 dated 19.11.1994 shows that the defendants was present before the Sub-Registrar and ready to execute the sale deed. It is submitted that despite the telegram, the plaintiff did not remain present before the Sub-Registrar to get the sale deed executed. On the contrary, the plaintiff by issuing legal notice (Exh.32) dated 21.11.1994 tried to create a false story about payment of Rs.1,00,000/- to the defendants for having vacant possession from the tenant.

17. It is pointed out that, immediately, vide telegram (Exh.28) dated 28.11.1994, it was informed to the plaintiff that the contents of the notices are false. It is submitted that, the legal notice (Exh.28) dated 28.11.1994, was issued by the defendants, calling upon the plaintiff to get sale deed executed within 15 days from the date of receipt. It is pointed out that, in the said notice (Exh.28) it was categorically mentioned that failure to get sale deed executed within 15 days, the contract shall stand cancelled and the earnest amount shall stand be forfeited. Thus, it is submitted that, despite this no steps were taken by the plaintiff to get sale deed executed and accordingly, the contract was cancelled.

18. It is submitted that the plaintiff failed to perform her part of contract and therefore, both the Courts below rightly denied the decree of specific performance.

19. It is submitted that it is a settled law that in the suit for specific performance, 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. In support of his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court of India, in the case of ***U.N. Krushnamurti Vs. A.M. Krishnamurthy***[9].

20. In the light of rival contentions of both the parties, I have perused the record, the impugned judgment and the decree.

21. The Hon'ble Supreme Court of India in the case of ***M/s. J.P. Builders*** (supra), while considering Section 16(c) of the Specific Relief Act, has held thus:

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9 2022 SCC OnLine SC 840

"9) The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contact. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

10) In N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao & Ors., (1995) 5 SCC 115 at para 5, this Court held:

> *".....Section 16(c) of the Act envisages that plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. 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 the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."*

11) In P.D'Souza vs. Shondrilo Naidu, (2004) 6 SCC 649 paras 19 and 21, this Court observed:

> *"It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstance of each case. No strait-jacket formula can be laid down in this behalf.... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."*

12) Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff. It has been rightly considered by this Court in R.C. Chandiok & Anr. vs. Chuni Lal Sabharwal & Ors., (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

22. The Hon'ble Supreme Court of India in the case of ***Satya Jain*** (supra), has held thus:

"25. The principles of law on the basis of which the readiness and willingness of the plaintiff in a suit for specific performance is to be judged finds an elaborate enumeration in a recent decision of this Court in ***J.P. Builders and another v. A. Ramadas Rao and another (2011 1 SCC 429 : [2011(5) ALL MR 899 (S.C.)].*** *In the said decision several earlier cases i.e. in* ***R.C. Chandiok vs. Chuni Lal Sabharwal (1970) 3 SCC 140, N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao (1995) 5 SCC 115*** *and* ***P.D' Souza vs. Shondrilo Naidu (2004) 6 SCC 649 : [2005 (5) ALL MR 15 (S.C.)]*** *have been noticed. To sum up, no straitjacket formula can be laid down and the test of readiness and willingness of the plaintiff would depend on his overall conduct i.e. prior and subsequent to the filing of the suit which has also to be viewed in the light of the conduct of the defendant. Having considered the matter in the above perspective we are left with no doubt whatsoever that in the present case the Plaintiff No.1 was, at all times, ready and willing to perform his part of the contract. On the contrary it is the defendant who had defaulted in the execution of the sale document. The insistence of the defendant on further payments by the plaintiff directly to him and not to the Income Tax authorities as agreed upon was not at all justified and no blame can be attributed to the plaintiff for not complying with the said demand(s) of the defendant.*

26. ...

27. The ultimate question that has now to be considered is whether the plaintiff should be held to be entitled to a decree for specific performance of the agreement of 22.12.1970. The long efflux of time (over 40 years) that has occurred and the galloping value of real estate in the meantime are the twin inhibiting factors in this regard. The same, however, have to be balanced with the fact that the plaintiffs are in no way responsible for the delay that has occurred and their keen participation in the proceedings till date show the live interest on the part of the plaintiffs to have the agreement enforced in law."

23. In the teeth of above referred observations of the Hon'ble Supreme Court of India, I revert back to the facts of the present case. From the record, it is clear that there was a clause in the agreement in respect of obtaining NoC from NIT and about the Income Tax Clearance Certificate. The (Exh.31) shows that it was informed by the defendants that, they have obtained the NoC from NIT and so far as Income Tax Clearance Certificate is concerned, it is not required. Accordingly, the plaintiff was asked to remain present at 11.00 a.m. on 19.11.1994, for execution of sale deed.

24. The NoC from the NIT was obtained in the month of September 1994, much before the date fixed for the execution of the sale deed. The Income Tax Clearance Certificate was not necessary as opined by the advocate and both the facts were communicated to the plaintiff by the telegram issued on 18.11.1994.

25. The plaintiff was asked to remain present at 11.00 a.m. on 19.11.1994 before the Sub Registrar for execution of sale deed and accordingly, the document Exh. 39 dated 19.11.1994 shows that the defendants was present before the Sub-Registrar and ready to execute the sale deed. Despite the telegram, the plaintiff did not remain present before the Sub-Registrar to get the sale deed executed. On the contrary, the plaintiff by issuing legal notice (Exh.32) dated 21.11.1994 tried to create a false story about payment of Rs.1,00,000/- to the defendants for having vacant possession from the tenant.

26. Immediately, vide telegram (Exh.28) dated 28.11.1994, it was informed to the plaintiff that the contents of the notices are false. The legal notice (Exh.28) dated 28.11.1994, was issued by the defendants, calling upon the plaintiff to get sale deed executed within 15 days from the date of receipt. In the said notice (Exh.28) it was categorically mentioned that failure to get sale deed executed within 15 days, the contract shall stand cancelled and the earnest amount shall stand be forfeited. Thus, despite this no steps were taken by the plaintiff to get sale deed executed and accordingly, the contract was cancelled.

27. Exh.39 shows that the defendants were remained present before the Sub-Registrar on 19.11.1994.

28. A legal notice (Exh.32) issued by the plaintiff dated 21.11.1994 makes it clear that the plaintiff did not remain present as requested by the defendants, vide telegram (Exh.31) for execution of sale deed on 19.11.1994. However, she insisted for vacant possession from the tenant and also for Income Tax Clearance Certificate. In the said notice, the plaintiff has also alleged that she paid Rs.1,00,000/- for having vacant possession from the tenant.

29. The reply to above referred notice, by defendant Exh.28 dated 28.11.1994 shows that, the defendants reiterated the fact that, no Income Tax Clearance Certificate is necessary. They have also pointed out that, the story of payment of Rs.1,00,000/- for having vacant possession is created one and false. The defendants further requested the plaintiff to get sale deed executed within 15 days from the date of the receipt of the reply or otherwise, the contract shall stand cancelled.

30. The plaintiff despite the said fact, instead of getting the sale deed executed, again insisted for vacant possession vide legal notice (Exh.32) dated 21.12.1994. The defendants in reply to it, has pointed out that as the time was the essence of contract by notice

(Exh.28) dated 28.11.1994, the agreement stood cancelled and the sale deed cannot be executed.

31. After this reply dated 21.12.1994, the suit came to be filed on 31.01.1997 i.e. after two years.

32. In the backdrop of above referred admitted facts, the pay orders (Exhs.33 and 35) produced on record by the plaintiff, showing that sufficient money was with her to perform her part of contract, is not sufficient to hold that the plaintiff was ready and willing to perform of her part of contract. But it is necessary to take into consideration other relevant factors including the conduct of the plaintiff prior and subsequent to the filing of the suit.

33. Though the defendants repeatedly informed their readiness to execute sale deed and though it was also informed that, they have obtained NoC and further no Income Tax Clearance Certificate is necessary to get sale deed executed, the plaintiff avoided to get the sale deed executed on the ground that the defendants promised her to give vacant possession. Thus, the plaintiff all the time was insisting for vacant possession.

34. Nevertheless in the plaint, the plaintiff has changed her stand and pleaded that she was ready to accept symbolic possession. Thus, the conduct of the plaintiff shows that she was not ready and willing to perform her part of contract, when the defendants were insisting her to get the sale deed executed.

35. Furthermore, repeatedly the plaintiff was informed by the defendants that the Income Tax Clearance Certificate is not necessary, as per the legal advice obtained by them. The plaintiff, despite the same, without showing how the Income tax Clearance Certificate is necessary in the present case for execution of sale deed, continued to insist the defendants for Income Tax Clearance Certificate. The said conduct of the aplintiff sufficiently shows that the plaintiff was, all the time on frivolous ground, avoiding to perform her part of contract. In addition to the same, the plaintiff has not sought prayer for quashing and setting aside the cancellation of agreement executed by the defendants.

36. At the same time, it is pertinent to note that in the agreement, there is no mention that Rs.1,00,000/- was paid by the plaintiff for having vacant possession. However, in legal notice (Exh.32) dated

21.11.1994, the plaintiff tried to make out the case that she paid Rs.1,00,000/- for having vacant possession from the tenant.

37. The judgments cited by the learned counsel for the plaintiff in the cases of ***P.D.'Souza*** (supra), ***Sughar Singh*** (supra) and ***Leeladhar (D) Thr. Lrs.*** (supra), are distinguishable on facts and therefore, of no help to the plaintiff.

38. There is no dispute as regards the law laid down in the case of ***R. Lakshmikantham*** *(supra)* that merely for delay in filing of suit after accrual of cause of action, it cannot be inferred against the plaintiff that he was not ready and willing to perform his part, if the suit was filed within a period of limitation.

39. In the present case, after cancellation of the sale deed, the suit was filed after two years. Though, it was filed within limitation, however, considering the peculiar facts and circumstances of the present case, as noted herein above by this Court, the delay of two years in filing the suit is significant in this case.

40. Thus, considering the overall conduct of the plaintiff and the oral as well as documentary evidence, it is evident that the plaintiff all the time was avoiding to perform her part of contract. In the circumstances, I have answered the substantial questions of law as follows:

41. Answer to Question No.(i) : In view of the findings recorded herein above, both the Courts below have justified in holding that, the appellant/original plaintiff was not ready and willing to perform her part of contract in terms of the agreement dated 19.07.1994.

42. Answer to Question No.(ii) : Both the Courts below have correctly appreciated the effect of Exhs.26, 27, 33 and 35 on the question of readiness and willingness shown by the appellant/plaintiff to perform her part of contract in the present case and denied the decree for specific performance.

43. In view of the answers recorded to the substantial questions of law, the second appeal is **dismissed**.

[ANIL S. KILOR, J.]

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