



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 387 OF 2019

Iqbal Baig s/o Niyaz Baig
age 52 years, occ. Business
r/o c/o Hotel Iqbal, Station Road,
Parbhani

.. Appellant

Versus

Mohd. Iliyas s/o Mohd. Bhai
age 39 years, occ. Business
r/o Station road, Parbhani

.. Respondent

Mr. R. F. Totla, Advocate for the appellant.
Mr. M. M. Patil (Beedkar), Adocate for the respondent.

CORAM : R. M. JOSHI, J.

RESERVED ON : 13th February, 2024.
PRONOUNCED ON : 23rd February, 2024.

JUDGMENT :

1. Suit bearing Special Civil Suit no. 81/2007 came to be filed by seeking specific performance of contract, which was decreed. Against the said judgment and decree, Regular Civil Appeal No. 119/2012 were preferred unsuccessfully. Against the concurrent findings and judgments and decrees, original defendant has preferred this appeal under Section 100 of Code of Civil Procedure.

2. Parties are referred to by their nominclature in the original proceedings for the sake of convenience.

3. Facts which led to filing of present appeal can be narrated in short as under :-

Defendant is owner of shop admeasuring 20 x 14 sq. ft. situated at property bearing Municipal No. 424, Iqbal Complex, Parbhani. As per the case of plaintiff, an agreement of sale (Exhibit 26) was executed between plaintiff and defendant on 7th January, 2004 in presence of witnesses. It was agreed between them that plaintiff will purchase the shop for consideration payable to defendant at the rate of Rs. 2,400/- per sq. ft. for the internal portion of the said shop. Earnest amount of Rs. 1,00,000/- was paid. It was agreed to execute the sale-deed before 31st March, 2004. Expenses of sale-deed were to be borne by plaintiff. Defendant No. 1 agreed to provide all essential documents such as P.R. card, transfer certificate and also accepted to clear municipal taxes, electricity bill etc. before executing the sale-deed. Plaintiff claims that he was ready and willing to make payment of remaining consideration to the defendant. However, defendant was not in a position to clear the dues and to handover the documents required for execution of the sale-deed. Defendant demanded Rs. 2,00,000/- from the plaintiff for the purpose of clearing dues which plaintiff agreed to pay. On payment of Rs.2,00,000/- the time for execution of sale-deed was extended upto 31st May, 2004. Thus, it is the case of plaintiff that he had paid total sum of Rs. 3,00,000/- out of total

consideration and he was always ready and willing to pay balance amount of Rs. 3,72,000/-. Plaintiff further claims that he published public notice in the newspaper showing his intention to purchase the said shop. He also issued notice to the defendant indicating that he is ready to pay remaining consideration and to call upon him to execute the sale-deed.

4. Defendant, by filing written statement, though has admitted the agreement to sale but denied measurements of the suit shop. It is his contention that time is the essence of contract and plaintiff was under contractual obligation to get the sale-deed executed by making payment of balance consideration till 31st March, 2004. It is alleged that plaintiff could not arrange the balance consideration and has requested for extension of time. Plaintiff is said to have agreed to pay damages by way of rent of the shop to the tune of Rs. 21,000/- and such agreement was in presence of witnesses i.e. Bashir and others and on this condition, defendant agreed to extend time for execution of sale-deed upto 31st May, 2004. It is the case of defendant that plaintiff was never ready and willing to perform his part of the contract and that the suit is not filed belatedly as such he is not entitled for the relief of decree of specific performance.

5. Issues were framed at Exhibit 19. Plaintiff examined himself and also led evidence of three other witnesses. Defendant, on the other hand, apart from leading his own evidence, led evidence of two witnesses.

Learned Trial Court accepted the case of plaintiff and proceeded to pass decree of specific performance. Defendant was unsuccessful before the First Appellate Court. Hence, this appeal.

6. Learned counsel for defendant submits that as per the terms of the agreement to sale, time is the essence of contract as it was agreed between the parties to execute sale-deed before 31st March, 2004. It is his further contention that once the parties have agreed to make the time as essence of contract, it is not open for them to plead general principle that time is not essence of contract in case of sale of immovable properties. It is his further submission that in order to succeed in seeking specific performance of contract, it is just and necessary for the plaintiff to plead and also prove readiness and willingness to perform his part of the contract which he has failed. In this regard, it is contended that evidence on record i.e. applications made before the Trial Court indicate that plaintiff did not have money to pay Court fees much less the balance consideration. It is submitted that plaintiff had sought time for payment of Court fees claiming financial crisis which shows that all throughout, plaintiff was not ready to perform his part of contract. He also sought to draw attention of the Court to the evidence on record to contend that plaintiff has failed to prove case for getting decree of specific performance of contract. He further submits that though the cause of action to file suit arose on 7th January, 2004, 19th March, 2004 and 31st May, 2004, the suit came to be filed in the year 2007.

This, according to him, shows that plaintiff did not have sufficient funds for payment of balance consideration and hence the suit was not filed immediately. It is also argued that prices of the properties since the time of execution of agreement have increased and as such plaintiff would not be entitled for the discretionary relief. In support of his contention, he placed reliance on following judgments :-

- i) Shenbagam and others vs. K. K. Rathinavel
2022 Live Law (SC) 74
- ii) Padmakumari and others vs. Dasayyan and others
2015 SCC OnLine 346.
- iii) A. K. Lakshmipathy vs. Rai Saheb Pannalal H. Lahoti Charitable
Trust
AIR 2010 SC 577
- iv) K. S. Vidyanadam and others vs. Vairavan
AIR 1997 Supreme Court 1751.

7. Learned counsel for plaintiff supported the impugned judgment and decree. It is his contention that the basic requirement of pleading and proof of readiness and willingness on the part of the plaintiff has been established before the Trial Court and on the contrary, evidence of defendant indicates that he was not ready to execute the sale-deed. It is also argued that in the cross-examination, defendant in no certain terms has stated that inspite of deposit of amount of balance consideration in the Trial Court, he is not ready to execute the sale-deed. It is his submission that evidence on record clearly shows that extension of time granted for execution of sale-deed was not on account of inability of plaintiff to pay

balance consideration but it was for non-compliance of the conditions by defendant such as non-payment of municipal axes and other dues etc. It is his submission that once plaintiff proves his readiness and willingness and that the defendant has committed breach of terms of agreement, it is not open for the Court to refuse decree for specific performance of contract. To support his submissions, he relied upon judgment of Apex Court in case of Gaddipati Divija and another vs. Pathuri Samrajyam and others, **2023 SCC OnLine SC 442**.

8. At the outset, it needs to be taken note of the fact that pursuant to the agreement to sale, defendant has put plaintiff in possession of suit shop. Plaintiff not only pleaded and proved his readiness and willingness to perform his part of contract but also deposited balance consideration before Trial Court. So also, there is no termination of agreement and even no suit is filed by defendant to seek repossession of suit property. Keeping these absolutely relevant and material facts, contentions of both sides require to be considered.

9. It is trite that in respect of immovable property, generally time is never essence of contract. No doubt, parties by specific agreement may bind themselves for execution of contract before a specified date. In this regard, it would be necessary to consider the documentary evidence placed on record coupled with ocular evidence of witnesses. There is no dispute

about the fact that agreement to sale dated 7th January, 2004 was executed on payment of earnest amount of Rs. 1,00,00/- between plaintiff and defendant wherein sale-deed was to be executed on or before 31st March, 2004. The said agreement contains various stipulations requiring its compliances to be made by defendant before execution of sale-deed. The requirement for plaintiff was to pay balance amount of consideration on the date of execution of sale-deed. Further there is no dispute with regard to the fact that by agreement dated 19th March, 2004 (Exhibit 27), parties have agreed for extension of time for execution of sale-deed upto 31st May, 2004, and that at the time of execution of the said document, a sum of Rs. 2,00,000/- was paid by plaintiff to the defendant in cash. Perusal of said document does not disclose that extension was sought by plaintiff on account of his inability to make payment of balance consideration, which fact has been admitted by witness of defendant – Bashir. In the absence of any recital in the said agreement regarding inability of plaintiff to make payment of consideration or any reliable evidence, it is not open for the defendant now to claim so. Moreover, there is absolutely no evidence on record to indicate that plaintiff did not have the required amount for payment of balance consideration and hence extension of time.

10. Plaintiff, apart from pleadings in the plaint about readiness and willingness, has examined himself to state that he was ready and willing to perform his part of the contract. In this regard, if cross-

examination of plaintiff is perused, it does not show that plaintiff was running short of money for payment of balance consideration. On the contrary, it has come in the cross-examination that plaintiff has two shops both are running condition. It has further come on record that money was available with the plaintiff for payment of balance consideration. He had issued notice on 27th May, 2004, offering defendant for payment of balance consideration and seeking execution of sale-deed. It has further come on record that he has obtained licence to run business in the suit shop. Defendant was unable to elicit any admission from the cross-examination of plaintiff in order to hold that he was not ready and willing to perform his part of the contract. On the other hand, if the evidence of defendant is considered, there is nothing to show that plaintiff lacked money. It is accepted by defendant that at the time of execution of agreement (Exhibit 27) for the purpose of extension of time for execution of sale-deed, a sum of Rs. 2,00,000/- was paid in cash. Thus, defendant admits to have received an amount of Rs. 3,00,000/- from plaintiff against the said transaction. It is also admitted by defendant that a notice was published by plaintiff even in the newspaper showing his intention to purchase the suit property. Most importantly, defendant has never terminated contract between the parties. In his cross-examination he has refused to execute sale-deed inspite of fact of deposit of amount of balance consideration in Court by plaintiff.

11. In this appeal, defendant has sought to place reliance on three applications filed in the suit by plaintiff seeking time for payment of Court fees. Application dated 27th April, 2007 states that plaintiff did not have money on that day to pay balance consideration and hence time was sought. On second occasion, vide application dated 4th June, 2007 plaintiff has claimed that he and his counsel are out of station which is a ground for non-payment of Court fees. In third application dated 14th June, 2007, it is stated that due to financial crisis, he is not able to pay the Court fees. Though defendant is now seeking to place reliance on these applications claiming them to be admission on the part of plaintiff showing his poor financial status, but during the trial these statements were neither referred not relied upon by defendant. Neither in the cross-examination statements made therein were confronted to the plaintiff nor it was taken as a ground before the Trial Court or even before the First Appellate Court, for challenge to readiness and willingness of plaintiff. Even if it is accepted that these statements are admissions as contemplated by Section 17 of Evidence Act, but in view of Section 31, they are not conclusive proof of matter admitted but may operate as estoppel. It is trite that the admissions are not absolute and its effect can be removed by offering explanation. Section 58 of Evidence Act, inter alia, provides that no fact needs to be proved in any proceedings which the parties have admitted in pleadings. Order VI Rule 1 of Code of Civil Procedure defines pleadings meaning 'plaint' or 'written statement'. Meaning thereby any admission given in plaint or written

statement need not be proved. But in respect of any other admission it needs to be proved, being not absolute. Aforestated applications are not plaint and hence it was necessary for the defendant to prove this admission. In the absence of drawing attention of plaintiff to these statements and without offering any opportunity to him to explain the same, so also for not raising the said issue before the Trial Court as well as First Appellate Court, it is not open for the defendant to raise a mixed question of fact and law before this Court in second appeal for the first time.

12. Be as it may, even if it is accepted that plaintiff had filed such applications, however, that by itself does not disentitle him to seek specific performance of contract. Pertinently, the relevant rules provide for discretion of the Court to extend time for payment of Court fee. No doubt, at all points of time, plaintiff is expected to show readiness and willingness to perform his part of the contract. However, that does not mean to say that plaintiff if in business must earn profits all times or any other source of income must have cash on all the days till the conclusion of proceedings. What is contemplated by readiness and willingness to perform part of contract by the purchaser is that as and when occasion arises for payment of balance consideration, he is ready and willing to do so. He may borrow money to pay balance consideration. While deciding question of readiness and willingness of plaintiff all surrounding facts of case are required to be

considered. Plaintiff is not expected to approach defendant continuously with payment and ask for execution of sale deed. There is nothing on record to indicate that defendant was ready to execute sale deed and plaintiff was unable to make payment of balance consideration. Having regard to these facts, this Court finds no reason to accept the contention sought to be raised by learned counsel for defendant in respect of inability of plaintiff to pay balance consideration, more particularly in view of admitted fact that the entire balance consideration has been deposited by the plaintiff before Trial Court on 9th July, 2009.

13. As far as filing of suit on 27th April, 2007 is concerned, undisputedly, the suit is filed within limitation. Once Statute provides for period of limitation for filing of the suit, plaintiff is not required to justify as to why he did not file suit immediately after accrual of cause of action more particularly peculiar circumstances in the instant case. It needs to be taken into consideration that defendant had handed over possession of suit shop to plaintiff at the time of execution of agreement to sale. He does not show compliances on his part. So also never terminates the contract nor seeks repossession of suit shop. In such circumstances, it is necessary to accept his explanation that owing to good relationship between them, plaintiff did not initiate legal proceeding immediately.

14. From the evidence on record it can be said that plaintiff has proved his readiness and willingness to perform his part of contract and on the other hand, defendant was unable to show that he has performed his part of the contract and that municipal taxes as well as other dues were cleared before 31st March, 2004 or 31st May, 2004. Plaintiff, therefore, was able to prove that there was breach committed by defendant of the agreed terms of the contract between them to become entitled for decree of specific performance.

15. Before amendment to Specific Relief Act in the year 2018, though grant of the relief of specific performance was discretionary, but the said discretion was to be exercised judiciously. Even the law as it stood in respect of said provision also clearly indicates that once plaintiff has proved readiness and willingness to perform his part of the contract with no fault on his part and breach of condition of agreement by defendant, there would be no other option for the Court but to grant specific performance of contract. Even otherwise, there is nothing on record to attribute any malafides against plaintiff in order to refuse such exercise of discretion. Mere increase in the prices of properties can not become sole reason to deny specific performance, unless otherwise also case is made out by defendant to deny such relief to plaintiff. No such circumstance exists in this case to deny decree to the plaintiff.

16. In respectful view of this Court, the judgments cited supra on behalf of defendant do not apply to the present case in view of material difference in the facts of present case as compared to those cases. Herein this case, there is handing over of possession of suit property and there is evidence to show that plaintiff had obtained licence to conduct business therefrom. Similarly, there is notice issued by plaintiff showing his intention to purchase the suit property whereas defendant even has not terminated the agreement at any time. Balance consideration is already deposited before Trial Court. Most importantly, even no suit is filed to seek repossession of suit shop by defendant. Further, there is no evidence led by defendant to show that he had paid property taxes and other charges in respect of suit shop.

17. All facts involved in the case are rightly taken into consideration by the Trial Court as well as First Appellate Court. The findings recorded by both the Courts are in consonance with the evidence on record. This Court, therefore, finds no perversity in the concurrent findings recorded by both Courts. In order to exercise jurisdiction under Section 100 of Code of Civil Procedure, it is absolutely essential for the appellant to show that there exists substantial question of law. It is trite that unless substantial question of law is involved, an appeal under Section 100 of Code of Civil Procedure can not be entertained. What is substantial question of law is well settled by now to say that a point of law which admits

of no two opinions may be a proposition of law but cannot be substantial question of law. To be “substantial”, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. Considering facts of the case, tested to the touchstone of evidence on record and law on the points involved, this appeal sans any substantial question of law.

18. In the result, appeal stands dismissed since sans substantial question of law.

19. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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