



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

SECOND APPEAL NO. 516 OF 2017

Jagannath s/o Pandurangji Brahme
(since deceased) through LRs.-

- 1] Kishor s/o Jagannath Brahme,
(since deceased) through LRs.-
 - i] Smt. Kalpana wd/o Kishor Brahme,
aged about 45 years, Occ. Housewife.
 - ii] Ku. Neha d/o Kishor Brahme,
aged about 27 years, Occ. Student.
 - iii] Ku. Priya d/o Kishor Brahme,
aged about 23 years, Occ. Student.
 - iv] Yash s/o Kishor Brahme,
aged about 21 years, Occ. Student.

All are R/o Plot No. 267, Garoba Maidan,
Old Bagadganj, Nagpur.

- 2] Mrs. Pushpa w/o Mahadeoraoji Vairagade,
aged about 70 years, Occ. Housewife,
R/o Khaparkheda, Bhanegaon Road,
Tahsil – Saoner, District – Nagpur.
- 3] Mrs. Sudha w/o Anilraoji Bhute,
aged about 52 years, Occ. Housewife,
R/o Ayodhya Nagar, Behind Post Office,
Tahsil and District – Nagpur.

...APPELLANTS

Versus

- 1] Omkar s/o Shivkumar Parihar,
aged about 64 years, Occ. Retired,
R/o Khapri Pura, Itwari, Nagpur.

- 2] Smt. Gangubai Laxmanrao Brahme
(since deceased) through LRs.-
- a] Arun s/o Baban Brahme,
aged about 50 years, Occ. Service,
R/o Omnagar, Tiranga Chowk, Nagpur.
- b] Nanda w/o Shankarrao Bondre,
aged about 47 years, Occ. Service,
R/o Plot No. 338, Near Gajanan Mandir,
Mahatma Gandhi Nagar, Nagpur.
- c] Madhuri w/o Vijayrao Wadibhasme,
aged about 45 years, Occ. Private Job,
R/o Near Madhuri Bakery, New Diamond Nagar,
Nagpur.
- d] Kalpana w/o Narayan Bawankule,
aged about 43 years, Occ. Private Job,
R/o Koradi Saoner Road, Nagpur,
Tahsil and District – Nagpur.
- e] Smt. Seema wd/o Suresh Brahme,
aged about 63 years, Occ. Housewife.
- f] Sachin s/o Suresh Brahme,
aged about 40 years, Occ. Private Job.
- g] Jayashri w/o Sandip Kewte,
aged about 37 years, Occ. Housewife.
- (e) to (g) all R/o NIT Apartment,
Sakkardara Chowk, Nagpur.
- h] Subhash s/o Laxman Brahme,
aged about 61 years, Occ. Retired,
R/o 92, Ashtavinayak Colony,
Hudkeshwar, Nagpur.
- i] Rajesh s/o Laxman Brahme,
aged about 50 years, Occ. Private,

R/o 92, Astavinayak Colony,
Hudkeshwar, Nagpur.

j] Manda w/o Manohar Selukar,
aged about 67 years, Occ. Housewife,
R/o Borgaon, Wardha, Tahsil and District – Wardha.

k] Leena w/o Ramaji Chakradhare,
aged about 65 years, Occ. Housewife,
R/o Manish Nagar, Railway Line,
Somalwada, Nagpur.

l] Rekha w/o Pandurang Borkar,
aged about 63 years, Occ. Private,
R/o Rampeth, Telephone Exchange,
C.A. Road, Nagpur.

...RESPONDENTS

Shri Rohit Joshi, Counsel for the appellants.

Shri J.M. Gandhi, Counsel for the respondent no.1.

CORAM : ANIL L. PANSARE, J.
ARGUMENTS HEARD ON : APRIL 1, 2024.
JUDGMENT PRONOUNCED ON : APRIL 18, 2024.

JUDGMENT :

. The appeal has been admitted on the following
substantial question of law :

*“Could it be said that the respondent/original plaintiff
is entitled for decree of specific performance of contract
in view of the provisions of Section 16-C of the Specific
Relief Act, 1963 ?”*

2] Appellant nos. 1 to 3 are the legal representatives

of original defendant no.1 – Jagannath. Respondent no.1 was the original plaintiff and respondent no.2 (now represented by her legal representatives) was original defendant no.2. The parties will be hereinafter referred to by their original nomenclature.

3] The plaintiff – Omkar filed a suit for specific performance of contract against defendant no.1 – Jagannath and defendant no.2 – Gangubai (both are now represented by their legal representatives). The parties entered into an agreement to sell on 14/6/2002 in respect of plot no. 267, admeasuring about 2.28 square feet, having Municipal Corporation House No. 442, situated at Central Avenue, Old Bagadganj, Nagpur for a total consideration of Rs.6,55,000/-. The property, so described, shall be hereinafter referred to as “the suit property”.

4] On the date of agreement, the plaintiff paid Rs.20,000/- towards earnest amount. Thereafter, he paid Rs.2,35,000/- from time to time. The balance amount of Rs.4,00,000/- remained to be paid, which according to the

plaintiff, was to be paid after completing certain formalities at the hands of the defendants, which included renewal of lease of the suit property by the Nagpur Improvement Trust (N.I.T.), mutation in City Survey Records, No Objection Certificate (N.O.C.) from the N.I.T., etc. As such, the remaining amount was agreed to be paid on or before 31/12/2002. However, for want of renewal of lease, N.O.C. and other formalities, the remaining amount was not paid, as agreed. The defendants extended the time, as they failed to obtain necessary documents. Thereafter, arose dispute between the parties and, hence, the present suit.

5] The defendants contested the suit. According to them, the plaintiff was never ready and willing to perform his part of contract. He was not having sufficient funds to pay the balance amount, and, therefore, he indulged into unnecessary correspondence. Accordingly, the defendants prayed for dismissal of suit.

6] The trial Court framed various issues and answered the same as follows :

Sr. No.	Issues	Findings
1	Whether the plaintiff was and is ready and willing to perform his part of the contract ?	In the affirmative.
2	Whether the plaintiff retained all relevant documents of the suit property ?	In the affirmative.
3	Whether the plaintiff is entitled for the relief of specific performance of contract ?	In the affirmative.
3(A)	Alternatively, when the plaintiff is entitled for refund of part consideration amount ?	Does not survive.
4	What order and decree ?	Suit is decreed with Costs as per final Order.

Accordingly, the trial Court decreed the suit.

7] Defendant no.1 assailed the judgment and decree in First Appeal No. 1015/2009. The First Appellate Court formulated the following points and answered the same as under :

Sr. No.	Points	Findings
1	Has it been proved that the plaintiff was ready and willing to perform his part of the contract ?	Yes.
2	Whether the plaintiff is entitled for specific performance of contract ?	Yes.
3	Whether the judgment and decree passed by the learned trial court suffers from any error, infirmity, or is perverse and illegal ?	Partly in affirmative.

4	Whether the judgment and decree passed by the learned trial court needs interference in appeal ?	Partly in affirmative.
5	What order ?	As per final order.

8] The First Appellate Court modified the decree because the subject matter of agreement (Exh. 23) as regards area was only 1140 square feet, along with a House admeasuring 500 square feet standing thereon, situated at the southern side of plot no. 267. The operative part of the judgment and decree, passed by the First Appellate Court, reads thus :

“i] The appeal is hereby partly allowed.

ii] The judgment and decree passed by the learned trial court is hereby set aside to the following extent, and the following order is passed :-

a] The suit of the plaintiff for specific performance of contract is hereby decreed, in respect of southern portion of plot no.267, admeasuring 1140 sq. ft. (105.90 sq. mtrs.), along with a constructed house on 500 sq. ft. thereon, in Ward No.24, Garoba Maidan, old Bagadganj, more particularly described at page no.4 of the agreement (Exh.23).

b] The defendants (the legal representatives of deceased defendant no.1 and defendant no.2) shall execute the sale-deed in favour of the plaintiff with vacant possession of suit property, after his depositing the amount of interest @ 9% per annum on

Rs.4 Lacs, from 06.03.2003 to 25.05.2009, within 90 days from today, and on failure, the appellants and defendant no.2 may apply u/s. 28(1) of the Specific Relief Act in the suit to have the contract rescinded and the trial court may order rescission as provided therein.

c] After execution of sale-deed as above in favour of the plaintiff, the legal representatives of deceased defendant no.1 (appellants) shall be entitled to receive 50% of the amount deposited in the Court by the plaintiff, and defendant no.2 shall be entitled to receive 50% therefrom, with accrued interest thereon, if any.

iii] Parties shall bear their own costs throughout.

iv] Decree be drawn up accordingly.

v] R & P be sent back to the learned trial court.”

9] As could be seen from operative Clause (b), the First Appellate Court has directed the plaintiff to deposit the amount of interest @ 9% per annum on Rs.4,00,000/- from 6/3/2003 to 25/5/2009. As directed, the plaintiff has deposited the balance amount of consideration on 25/5/2009. I will come back to the reasons why the First Appellate Court has awarded interest @ 9% per annum from 6/3/2003, but the said part of the decree attains significance to understand the correctness of appreciation of evidence by the Courts below.

10] I have heard Shri Rohit Joshi, learned Counsel for

the appellants and Shri J.M. Gandhi, learned Counsel for respondent no.1. The controversy revolves around procurement of N.O.C. from N.I.T. and getting the lease renewed before execution of sale-deed. The agreement to sell was executed on 14/6/2002. The sale-deed was to be executed on or before 31/12/2002. The First Appellate Court has noted that No Objection Certificate (Exh.37) was procured by the defendants on 5/3/2003, which fact was informed to the plaintiff by notice/reply (Exh.29) dated 6/3/2003. The First Appellate Court then noted that owing to dispute between the defendants about apportionment of amount of consideration, the sale-deed could not be executed, though the plaintiff was ready and willing to do so. The parties then indulged into exchanging notices and ultimately, the suit came to be filed.

11] The Courts below have rendered a concurrent finding that the plaintiff was always ready and willing to perform his part of contract. The Courts below attributed fault to the defendants and accordingly decreed the suit in favour of the plaintiff.

12] Shri Gandhi, learned Counsel for respondent no.1, contends that the substantial question of law, as formulated, is not a question of law but relates to question of facts and, therefore, this Court ought to be slow in entertaining the Second Appeal on the aforesaid question. He placed reliance on the judgment in the case of *Harjeet Singh And Another Vs. Amrik Singh And Another [(2005) 12 SCC 270]* wherein the Hon'ble Supreme Court has held that the questions whether the plaintiffs were always ready and willing to perform their part of contract and are entitled to a decree for specific performance or whether the plaintiffs are entitled to alternative relief of compensation under the Specific Relief Act, are not the questions of law at all. The Supreme Court, however, noted that the case, put forth before the High Court, was not a case of finding of perversity but a case of appreciation of evidence. In the present case, defendant no.1 has, however, come up with a case of perverse finding by the Courts below and in this context, the evidence has been referred to. The Judgment will be, therefore, not relevant.

13] Shri Gandhi, learned Counsel, then referred to the following judgments to contend that interference with the concurrent finding of the Courts below by the High Court, even in a case of error on the part of First Appellate Court in recording the finding of fact, would not itself be a ground for the High Court to upset the same and further that Second Appeal is permissible only on substantial question of law and not on question of facts :

- 1] *Madhavan Nair Vs. Bhaskar Pillai (Dead) By LRs.* [(2005) 10 SCC 553.
- 2] *S. Subramanian Vs. Ramasamy Etc. Etc.* [AIR 2019 SC 3056].
- 3] *Damodar Lal Vs. Sohan Devi And Others* [(2016) 3 SCC 78].
- 4] *Boodireddy Chandraiah & Ors. Vs. Arigela Laxmi & Anr.* [AIR 2008 SC 380].
- 5] *Gulam Magdum s/o Gulam Sarvar Vs. Shoukera Begum w/o Gulam Arif and others* [2022(5) Mh.L.J. 178].

14] To my mind, the law on this point is well settled. Interference with concurrent finding on facts by the Courts below, is not permissible unless such finding is based on no evidence or is perverse. If conclusion on facts, in the evidence made by the Courts below, is a possible one, there could not be perversity, and if it is not, the finding will be perverse. Further,

inadequacy of evidence or different reading of evidence is not perversity, nor will a wrong finding of fact by itself constitute a question of law unless a wrong finding stems out of a complete misreading of evidence and/or is based only on conjectures and surmises. It is further well settled that if two views are possible, merely because another view is available to be taken, the High Court cannot exercise its jurisdiction under Section 100 of the Code of Civil Procedure, 1908. Further, even erroneous finding cannot be interfered with, particularly when such concurrent finding is based on plausible appreciation of evidence.

15] Keeping in mind the aforesaid well settled principles of law, the question that falls for my consideration is whether the concurrent finding, rendered by the Courts below, is perverse. Answer is in the affirmative for following reasons :

16] As stated earlier, the controversy revolves around renewal of lease deed and procurement of N.O.C. from N.I.T. The notices exchanged by and between the parties, have crystallized this issue. The first such notice is dated 3/2/2003

(Exh. 24) issued by the plaintiff to the defendants stating therein that it was agreed that a sum of Rs.1,00,000/-, out of purchase consideration, was to be paid to the defendants on producing renewed lease deed, mutation certificate and N.O.C. from N.I.T. The balance purchase consideration of Rs.4,00,000/- was to be paid at the time of registration of sale-deed. It has been then mentioned in the notice that on 19/12/2002, the defendants have delivered only renewed lease deed to the plaintiff and demanded Rs.1,00,000/-, which the plaintiff has paid. The plaintiff has then mentioned in the notice that he has not received, from the defendants, N.O.C. from N.I.T. and, therefore, called upon the defendants to provide the same and to execute the sale-deed within the extended time limit, which was allegedly extended by the defendants till 5/2/2003. The defendants were further cautioned that upon their failure to provide N.O.C., the plaintiff may exercise all the legal options, including cancellation of agreement and claim of refund of amount etc.

17] Thus, in the notice issued by the plaintiff on

3/2/2003, he admits that on 19/12/2002, the defendants had delivered the renewed lease deed. He called upon them to produce N.O.C. and upon failure to do so, he cautioned them of cancellation of agreement, which he never did.

18] To this notice, the defendants, in their response dated 8/2/2003 (Exh. 25), stated that, to obtain N.O.C. was the obligation of the plaintiff. Accordingly, they called upon the plaintiff to get the said N.O.C. at the earliest.

19] Thereafter, on 22/2/2023, the plaintiff issued yet another notice to the defendants (Exh. 27) stating therein that the obligation to procure N.O.C. was of the defendants and not of the plaintiff.

20] On 6/3/2003, the defendants issued notice to the plaintiff (Exh. 29) mentioning therein that the defendants have already supplied the original documents pertaining to their title such as sale-deed, akhiv patrika, etc. The only document left was N.O.C. from N.I.T. The defendants stated that they have obtained N.O.C. from the Competent Authority (Exh. 37) and, therefore, there remains no hurdle in executing the sale-deed.

Accordingly, the defendants called upon the plaintiff to execute the sale-deed by remaining present in the office of the Sub-Registrar, Mahakalkar Building, Raghuji Nagar, Nagpur on 24/3/2003 at 11:00 am along with balance amount of consideration.

21] In response to the aforesaid notice, the plaintiff has, on 17/3/2003 (Exh. 30), for the first time, raised the issue of apportionment of balance consideration amount. The plaintiff states that the request of the defendants, to remain present on 24/3/2003 at the office of the Sub-Registrar, cannot be complied with because they are avoiding a dialogue to ascertain the apportionment of the balance amount of consideration to be shared between them.

22] This contention of plaintiff was countered by the defendants by issuing yet another notice dated 24/3/2003 (Exh. 31). The defendants alleged that, by the aforesaid reply, the plaintiff has exposed himself of his inability to perform his part of contract and is thus intending to just pass the time as he is short of funds to get the sale-deed executed. The tactics

adopted by the Plaintiff are said to be baseless and perverse. The defendants denied that the plaintiff made any attempt to contact them. The defendants stated that the plaintiff met them at the office of their Counsel, where modes of transaction were discussed and copy of N.O.C. was given to the plaintiff. This is how the position was clarified by the defendants on 24/3/2003.

23] The plaintiff then remains completely silent until August, 2003, i.e., for about five months and on 23/8/2003, the plaintiff issued yet another notice (Exh. 34) blaming the defendants for killing the time unnecessarily and called upon them to register sale-deed within three days from the date of receipt of the said notice.

24] The defendants responded vide reply dated 30/8/2003 (Exh. 35) stating therein that all the documents were furnished to the plaintiff on or prior to 6/3/2003 and, thus, the defendants were equipped with all requisite documents for executing the sale-deed. They further alleged that the plaintiff failed to perform his part of contract and is

taking advantage of his own wrong.

25] Shri Joshi, learned Counsel for the appellants, submits that the plaintiff, in his notice dated 23/8/2003, has not uttered a word as regards apportionment of balance amount. He does not say that the defendants were not equipped with necessary documents for execution of sale-deed. The plaintiff has suddenly come up with a case through notice calling the defendants to execute the sale-deed in three days. He (Plaintiff) made a vague statement that the defendants are unnecessarily killing the time.

26] The learned Counsel further submits that even in the plaint, the plaintiff has not pleaded as regards the *inter se* dispute between the defendants about apportionment of balance consideration amount. Despite such status, the Courts below have held that the issue of apportionment of amount of consideration was not resolved amicably and owing to the said dispute, the execution of sale-deed was delayed, though the plaintiff was ready and willing to get it executed. This finding, according to Mr. Joshi, is perverse.

27] Shri Gandhi, learned Counsel for respondent no.1, could not point out from the pleadings that the issue of apportionment of amount was raised in the plaint.

28] Shri Gandhi, learned Counsel for respondent no.1, states that this issue was raised through notice (Exh. 30) and the notice is annexed with the plaint. In that sense, he submits that the plaintiff has pleaded about the issue of apportionment of amount.

29] This argument does not carry any substance inasmuch as the notice (Exh. 30) was countered by the defendants. The plaintiff was called upon to execute the sale deed on 24/3/2003. The plaintiff has done nothing except for publishing a public notice in May, 2003, which has no bearing on the issue of apportionment of amount. Further, in the last notice issued by the plaintiff in August, 2003 (Exh. 34), not a single word has been uttered on the point of apportionment of amount. This omission by the plaintiff, subsequent to the assertion by the defendants that there was no issue about apportionment of amount, would amount to acceptance by the

plaintiff by the claim made by the defendants on this issue.

30] This acceptance has been further substantiated by the plaintiff by not incorporating pleadings in the plaint. In fact, the Courts below have not even formulated any issue as regards the dispute *inter se* between the defendants on apportionment of balance consideration amount. In absence of pleadings, issue and evidence, the Courts below have rendered a perverse finding that the issue was not resolved amicably and, therefore, the sale-deed could not be executed.

31] There is another reason why the plaintiff is not entitled for discretionary relief. The plaintiff, despite acknowledging the fact in notice (Exh. 24) issued by him that on 19/12/2002, the defendants had delivered him renewed lease deed, the plaintiff in the plaint has made a false statement in paragraph 9 that till date, the defendants have never informed the plaintiff as to what is the position in regard to renewal of lease deed. Further, in the evidence, the plaintiff has deposed that he has been making enquiries with the defendants and made a query as to how is it possible to execute

the sale-deed without securing renewal of lease deed and N.O.C. from N.I.T. The plaintiff further deposed that instead of executing and registering the sale-deed by getting the lease deed renewed, the defendants have avoided to perform their part of contract. The plaintiff then deposed that till date (affidavit of evidence is dated 4/10/2008), the defendants have never informed him as regards the position of renewal of lease deed and other title documents.

32] Thus, the plaintiff has knowingly made a false assertion on the point of renewal of lease. In his notice dated 3/2/2003, he had categorically acknowledged that on 19/12/2002, the renewed lease was handed over to him. Despite such fact, he has come up before the Court with a plea that the defendants have not obtained the renewed lease and that till the time when he entered witness box, he was not even aware of the status of the lease deed. Even in cross-examination, he made an attempt to avoid giving answer, about knowledge of renewed lease. When asked, he deposed that he does not know that the lease was renewed on

30/9/2002. However, he admits that only N.O.C. from N.I.T. was remaining to be obtained. Thereafter, he admits that the defendants obtained N.O.C. on 5/3/2003 and that the defendants had intimated him for execution of sale-deed after obtaining N.O.C. He further admits that photocopy of N.O.C. was supplied to him by the defendants and he acknowledged the same (Exh. 38). He then admits that after 13/3/2003, he could have executed the sale-deed of the suit property. Thereafter, a case was put up that he was not ready with the balance consideration amount, which is denied by him. The plaintiff, however, deposed that he has not filed any documentary evidence to show that he was having balance consideration amount for execution of sale-deed.

33] The Plaintiff, thus, made a false statement that he was not aware of the status of the lease deed. He gave evasive answers on this point in the cross-examination. He was, however, made to admit that NOC only was remaining to be obtained. He further admits that on and after 13/3/2003, he could have executed sale deed. The last two admissions clearly

show that the Plaintiff was aware of the status of renewed lease deed.

34] Thus, the plaintiff has not come clean before the Court, at least on the point of renewal of lease. Even this fact has been not considered by the Courts below while appreciating evidence. He is, therefore, not entitled for discretionary relief.

35] In fact upon noticing above status, the first appellate court appears to have awarded interest @ 9% per annum from 6/3/2003 because it found that the defendants had furnished, on 5-6/3/2003, all documents necessary to execute the sale-deed, but the defendants did not execute the same. Thus, in a way, the First Appellate Court found that there was no reason why should the plaintiff not execute sale-deed on or after 6/3/2003 by depositing balance consideration amount. Once the First Appellate Court took cognizance of the fact that the defendants had performed their part of contract by 5/3/2003, the plaintiff carried a heavy burden to prove that subsequent thereto till filing suit, he was capable of paying

balance consideration amount.

36] The question of readiness and willingness of the plaintiff to perform his part of contract will have to be considered in the light of above facts. As noted, the plaintiff admits that all the documents for execution of sale-deed were obtained by the defendants and the plaintiff could have executed sale-deed from 13/3/2003 onwards. He further admits that the defendants had intimated him for execution of sale-deed after obtaining N.O.C. Despite such fact, he has not executed the sale-deed from March, 2003 till filing of suit. He has not assigned any acceptable reason for not doing so.

37] In this context, the case put up by the defendants that the plaintiff had no amount to pay balance consideration amount will have to be examined. The plaintiff has not produced on record any document to show that he had, in his account or otherwise, balance amount ready with him. He was aware that N.O.C. was valid for six months. The plaintiff, by adopting dilatory tactics, allowed validity of N.O.C. to be lapsed, but by blaming the defendants and filed suit in

October-2003. The notice issued by him on 23/8/2003, calling upon the defendants to execute the sale-deed in three days, is nothing but an attempt to create an evidence that he was ready and willing to perform his part of contract.

38] Shri Gandhi, learned Counsel for respondent no.1, has invited my attention to the terms of agreement, where it is mentioned that the plaintiff will arrange balance consideration amount by obtaining loan. The learned Counsel initially made an attempt to pursue this point by contending that necessary documents were not furnished by the defendants and, therefore, loan could not be obtained, but after realizing the fact that the plaintiff has not based his case on the said ground, he did not press this argument any further.

39] He then contends that the law is well settled that for showing readiness and willingness to perform contract, the plaintiff is not duty bound to prove that he had, in his account, balance consideration amount. It will be sufficient if it is shown that he was capable of arranging balance consideration amount within time. He submits and rightly so that overall evidence

will have to be considered to arrive at a conclusion as to whether the plaintiff was always ready and willing to perform his part of contract. He has referred to the following judgments in support :

- 1] *Shaligram s/o Vitthalrao Sawant Vs. Ramesh s/o Bhagwan Gawande* [2014(3) Mh.L.J. 704].
- 2] *Mst. Sugani Vs. Rameshwar Das & Anr.* [AIR 2006 SC 2172].
- 3] *P. D'Souza Vs. Shondrilo Naidu* [AIR 2004 SC 4472].

The Supreme Court held that specific words are not necessary while pleading readiness and willingness of contract. The principle behind such requirement is to show that the plaintiff's conduct was blamishless.

In *P. D'Souza (supra)*, the facts were such that the vendee was tenant of vendor and the vendor herself failed to produce original documents and redeemed mortgage in respect of the suit property. The sale-deed, therefore, could not be executed. The Supreme Court held that in such case, the question of vendee's readiness and willingness to perform her part of contract would not arise.

This finding has been given in context with whether

time was the essence of the contract. The Supreme Court held that vendor cannot turn around and plead that time was the essence of the contract and that vendee was not ready and willing to perform her part of contract.

40] Thus, it depends on the facts of each case as to whether the plaintiff has discharged his burden as regards his readiness and willingness to perform his part of contract. In the present case, the requisite documents, for execution of sale-deed, were obtained by the defendants. The plaintiff, therefore, cannot take assistance of *P. D'Souza's* case to contend that the question of his readiness and willingness to perform his part of contract will not arise. In fact, the plaintiff has admitted, in cross-examination, that he could have executed the sale-deed on and after 13/3/2003. He was, therefore, under obligation to prove that he was always ready and willing to perform contract post 13/3/2003 till 7/10/2003 i.e. the day on which the suit was filed. In the present case, the plaintiff failed to show that during this period, he was always ready and willing to perform his part of contract.

41] The Courts below have unnecessarily stretched the issue of apportionment of amount of balance consideration amount amongst the defendants when there was absolutely no evidence on this point, rather the evidence was otherwise. I will reiterate that subsequent to the defendants' response to the plaintiff's allegation that there was issue as regards apportionment of balance consideration amount, the plaintiff, in his subsequent correspondence and also in plaint, has not raised this issue. In that sense, the plaintiff has accepted the plea of the defendants that there was no such issue and further that the modes of payment of balance consideration amount were discussed and settled in the office of the defendants' Counsel in March, 2023.

42] The learned Counsel for the appellants has invited my attention to the judgment of the Supreme Court in the case of *N.P. Thirugnanam (Dead) By LRs Vs. Dr. R. Jagan Mohan Rao And Others* [(1995) 5 SCC 115], wherein the Court, while dealing with Section 16(c) of the Specific Relief Act, 1963 (for short "the said Act"), held that 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 suit along with other attending circumstances. The Court further held that the amount of consideration, which the plaintiff has to pay to the defendants, must of necessity be proved to be available and further that the plaintiff must prove that he was ready and has always been willing to perform his part of contract right from the date of execution of agreement till the date of decree.

43] In the present case, the plaintiff has not shown his readiness and willingness to pay the balance consideration amount, at least for the period from March, 2003 onwards. Nothing really prevented the plaintiff from depositing the balance consideration amount in the Court or at least to show his willingness to do so, pending trial. He has not done so and has deposited the amount only in the year 2009, i.e., subsequent to passing decree by the trial Court. Thus, there is/was a serious doubt as regards the plaintiff's ability to pay the balance consideration amount.

44] Another judgment, which the learned Counsel for the appellants, has relied upon is the case of *Ritu Saxena Vs. J.S. Grover And Another [(2019) 9 SCC 132]*. The Supreme Court held that while assessing readiness and willingness of the plaintiff to perform his part of contract, the financial capacity of the plaintiff to pay balance amount of consideration will have to be established.

45] The judgment cited by the learned Counsel for the appellants would only certify that the issue of readiness and willingness to perform the plaintiff's part of contract will be dependent on the facts of each case. In a given case, like in the present case, proof as regards availability of funds with the plaintiff at the relevant time, would be vital. Considering the plaintiff's conduct post March, 2003 till filing suit and even subsequent thereto, the plaintiff ought to have placed on record cogent evidence to show that balance consideration amount was available with him or that he had capabilities to pay the same immediately. The plaintiff here admits that on and after 13/3/2003, he could have executed the sale-deed. If

that be so, there appears no other reason except the plaintiff's inability to pay balance consideration amount to not execute the sale-deed. The Courts below have not considered this aspect as well.

46] The trial Court, in paragraph 12 of its judgment, has observed that it has not come across in any evidence that the suit property was clear for execution of sale-deed. This finding is contrary to the plaintiff's admission that the defendants had obtained all the requisite documents in March, 2003 and that the plaintiff could have executed the sale-deed on or after 13/3/2003. This finding is, thus, perverse being contrary to evidence.

47] The First Appellate Court, while appreciating the evidence has, in paragraph 16 noted that in cross-examination, defendant no.1 admitted that he could not execute the sale-deed in favour of the plaintiff. I have gone through the cross-examination to find that no such admission could be said to be given by defendant no.1 if the entire evidence is considered. The relevant part of the evidence is as under :

“3.It is true I assured to the plaintiff that on 05-02-2003, I will execute and registered the sale deed of the suit property. It is true on 03-02-2003, the plaintiff sent a notice to call upon me to execute the sale-deed. It is true I replied that on 08-02-2003. It is true thereafter on 13-02-2003, I filed a Caveat in Civil Court at Nagpur. It is true on 22-02-2003, he again sent a notice. It is true as I could not execute the sale-deed in favour of the plaintiff, therefore, he again sent a notice on 23-08-2003. I am unable to say the recital of my reply at Exh.35 as it is in English. I did not cancel an agreement. I am not ready to execute the sale-deed of the suit property in favour of the plaintiff.”

48] Thus, there is a statement, in the form of admission, that defendant no.1 could not execute sale-deed in favour of the plaintiff and, therefore, he (plaintiff) again sent a notice on 23/8/2003. In my view, this cannot be said to be an admission by defendant no.1 that he could not execute the sale-deed in favour of the plaintiff. What has been admitted is that because he did not execute sale-deed, the plaintiff again has sent a notice on 23/8/2003. Defendant no.1 has then categorically said that he is not ready to execute the sale-deed of the suit property in favour of the plaintiff. Thus, the entire evidence if looked into, it will be far-fetched to say that defendant no.1 has admitted that he could not execute the

sale-deed in favour of the plaintiff and further to take that admission as basis to grant specific performance in favour of the plaintiff, who firstly has not come clean before the Court and secondly has failed to prove that he was always ready and willing to perform his part of contract.

49] It cannot be, therefore said that the plaintiff is entitled for decree of specific performance of contract in terms of Section 16(c) of the said Act. The substantial question of law is accordingly answered in the negative. The defendants, therefore, have made out a case in their favour resulting into following order :

ORDER

- i] Second Appeal is allowed.
- ii] The judgment and decree dated 26/3/2009 passed by the 3rd Joint Civil Judge Senior Division, Nagpur in Special Civil Suit No. 780/2003 as well as the judgment and decree dated 15/3/2017 passed by the District Judge – 11, Nagpur in First Appeal No. 1015/2009, are quashed and set aside.

iii] Special Civil Suit No. 780/2003 is dismissed.

iv] The plaintiff is entitled to withdraw the amount deposited by him with the trial Court along with interest accrued thereon.

50] The appeal is accordingly disposed of with no order as to costs.

JUDGE

Sumit