

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 484 OF 2018
WITH
CIVIL APPLICATION NO. 1111 OF 2018**

Shri. Prith Pal Singh Bharara **... Appellant**

V/s.

Shri. Machindra Chandrakant Kamthe & Ors. **... Respondents**

Mr. Vijay Patil I/b Yogesh Patil for the Appellant.

**CORAM : A.M.DHAVALA, J.
DATE : 4th SEPTEMBER, 2018**

P.C.:

1 Heard learned Advocate Mr. Vijay Patil for the Appellant. He asks for admission of the Appeal on the proposed substantial questions of law; (i) that the finding of the learned Appellate Court that the Plaintiff was not ready and willing to perform part of the contract is not proper and based on pleadings and evidence on record deserves to be set aside; (ii) the defendant Nos. 2 and 3 have not challenged the judgment and decree of the Trial Court and therefore, the judgment and decree as well as Sale Deed executed should have been maintained with regard to the shares of defendant Nos. 2 and 3?

2 The relevant facts for appreciating the arguments may be stated as follows:

(i) By Agreement dated 18.05.1989, Defendant No.4 as Power of Attorney for Defendant Nos. 1 to 3 executed Agreement for Sale in favour of the Plaintiff for Sale of land of 49.5 Ares for price of Rs.10,000/- per Are total Rs.5,00,000/-. Earlier on 14.04.1989, the amount of Rs.21,000/- was advanced and on 18.05.1989 a cash of Rs.1,00,000/- along with two cheques of Rs.50,000/- was advanced. The Sale Deed was to be executed within six months and the Plaintiff had assured to pay balance amount at the time of Sale Deed. According to plaintiff, thereafter there was dispute between the defendants inter se, which constrained him to stop payment of cheques dated 18.05.1989. Later on, the defendants assured the Plaintiff that their disputes were over and they are in position to make out a clear and marketable title of the suit property. The plaintiff was ready to pay balance amount which was kept by him ready. The plaintiff claimed that the defendants had put him in possession of the suit property, but no sale deed was executed and the defendant delayed the execution of the sale deed. Ultimately on 06.01.1995, the Plaintiff issued notice to the Defendants and called upon them to execute the sale deed of the suit property. Since, the notice was not complied, the suit came to be filed on 04.02.1995. The suit was not contested by the Defendants. At the time of evidence, the Plaintiff deposed that he had paid Rs.2,21,000/- and he was ready to pay balance amount and the learned Trial Court accepted his evidence and decreed the suit directing him to pay the balance amount of Rs.2,79,000/- within two months. It is submitted that

balance amount of Rs.2,79,000/- was paid and Sale Deed was executed in favour of the Plaintiff. Meanwhile a legal heir of Defendant No.1 alone filed Regular Civil Appeal No. 497 of 2012. In the said proceeding, it was revealed that there was payment of Rs.1,21,000/- only at the time of agreement or before agreement. The Sale Deed was executed on payment of Rs.4,00,000/- only. The Plaintiff offered and deposited Rs.1,00,000/- in the Court. On merits, the learned District Judge-9, Pune held that there was no readiness and willingness to perform the part of the agreement on the part of the Plaintiff. There was no payment of Rs.2,21,000/- before filing suit. In view of these findings, the Appeal was allowed and the judgment and decree passed by the Trial Court was set aside and the suit was dismissed with costs.

3 Admittedly, the Plaintiff had issued cheque of Rs.1,00,000/- towards part payment in 1989 and the said payment was stopped. The Plaintiff had not issued any notice disclosing the reasons for stopping the payment. As per the plaint in 1992, the defendants intimated to the Plaintiff that the disputes between the defendants were over and even thereafter, the plaintiff did not take steps for payment of remaining amount including the cheque amount, nor made any positive efforts for obtaining the execution of Sale Deed for 3 years. As per the agreement, the sale deed was to be obtained within six months whereas the suit is filed after six years. There may be some justification upto 1992 on account of internal dispute between the defendants. But thereafter, that justification was

not available. The Plaintiff has falsely deposed that the amount of Rs.2,21,000/- was paid when he had paid Rs.1,21,000/- only. He was not willing to pay Rs.3,79,000/- which was balance amount right from the date of his evidence till actual execution of Sale Deed in his favour. The Sale Deed was also executed when the entire agreed amount of Rs.5,00,000/- was not paid. In the light of this fact, I find that, the finding of the learned Appellate Court that there was no readiness and willingness on the part of the Plaintiff is not assailable. No perversity or ignorance of any material evidence is disclosed. The question of readiness and willingness is statutory requirement under Section 16(1)(c) and if it is found not satisfactory, the entire suit is liable to be dismissed. The decree of specific performance could not have been granted. No substantial question can be framed on this point.

4 However, it is a matter of record that in pursuance of decree of specific performance, the plaintiff has deposited Rs.2,79,000/- and sale deed was executed in his favour. In this regard, no order has been passed in the Appeal. The learned Appellate Court has not considered these aspects and has not passed any order regarding the refund of Rs.2,79,000/- and cancellation of sale deed which was essential in the facts of the case. In view of this fact, the following substantial question is framed.

“Whether the Appellate Court has committed error in not taking into consideration the subsequent event of payment of Rs.2,79,000/- by

the Plaintiff as per the judgment and decree of the Trial Court and execution of sale deed in favour of the Plaintiff in pursuance of the said judgment and passing of any order regarding possession?”

5 On this substantial question of law, the Appeal is admitted.

6 It is also argued that only legal heirs of Defendant No.1 alone has filed Appeal and Defendant Nos. 2 and 3 have not challenged the judgment and decree of the Trial Court. It is a common agreement executed by Defendant Nos. 1 to 3 in favour of the plaintiff. It is not separable. Since, judgment and decree were against all the defendants, if the other two Defendants were not available for filing Appeal, one of the defendants could have filed appeal challenging the judgment and decree.

7 Issue notice to the Respondents with intimation that appeal will be heard finally on the next date, returnable on 03.10.2018.

(A.M.DHAVALA, J.)