

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

**SECOND APPEAL NO. 115 OF 2002
WITH
CIVIL APPLICATION NO. 2069 OF 2002**

Yashwant s/o Keshav Shelar
Since deceased, by his legal representatives, namely,

- 1A. Govind Yashwnat Shelar,
Age : 54 yers, Occ: Service,
- 1B. Ramesh s/o Yashwant Shelar,
Age : 48 years, Occ. Service.
- 1C. Kausalya Yashwant Shelar,
Since deceased, her heirs namely, 1A and 1B.

All R/o: Kedgaon, Tq. and
Dist. Ahmednagar.

APPELLANTS
(Orig. Plaintiffs)

VERSUS

- 1. Kisan s/o Keshav Shelkar, Died,
Since deceased by his Heirs
and Legal representatives namely;
- 1-a. Smt. Indubai Anand Shelar,
Age – 43 years, Occu. Household,
R/o. 1950, Daware Galli,
Ahmednagar.
- 1-b. Yogesh S/o. Anand Shelar,
Age – 30 years, Occu. Service,
R/o. 1950, Daware Galli,
Ahmednagar.
- 1-c. Smt. Sumanbai Vasant Kshirsagar,
Age – 60 years, Occu. Household,
R/o. Bhoir Galli, Nirajgaon,
Tq. Karjat, Dist. Ahmednagar.
- 1-d. Sakhubai W/o. Ambadas Chatur,

Age – 50 years, Occu. Household,
R/o. 195, Dabari Galli, Ahmednagar.
(SA is abated as per order dt. 6.4.15)

1-e. Nirmalabai W/o. Narayan Kale,
Age – 50 years, Occu. Household,
R/o. M. K. Galli, Pashan, Pune.
(SA is dismissed as per order dt. 6.4.15).

... **RESPONDENTS**

.....
Mr L. V. Sangeet, Advocate for the appellants
Mr V. S. Bedre, Advocate for respondent No. 1A and 1B.
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CORAM : **T. V. NALAWADE, J.**
DATE : **30TH SEPTEMBER, 2015.**

ORDER:

. The present appeal is filed to challenge the judgment and decree dt. 2.1.1997 passed in R.C.S. No. 680/1986, which was pending in the Court of Jt. Civil Judge, S.D., Ahmednagar and also judgment and order delivered in R.C.A. No. 146/1998, which was pending in the Court of extra Jt. District Judge, Ahmednagar. The suit for specific performance of contract was filed by respondent – Kisan Keshav Shelar and same is decided in his favour.

2. Heard learned Counsel for the appellant – original defendant.

3. The suit property is a part of property bearing City Survey No. 1952 situated in Ahmednagar, which is given house No. 1950 in the assessment record of local body. The original defendant – Yashwnat Keshav Shelar was real brother of the plaintiff. It is the case of the plaintiff that, Defendant No. 1 had agreed to sell his share to plaintiff and the agreement was written on stamp paper. It is contended that, in the partition, portion of 20 x 20 ft. came to share of defendant and it was adjacent to portion which came to share of plaintiff.

4. It is the case of the plaintiff that, the defendant had agreed to sell the suit property for consideration of Rs. 12,000/- and the agreement was made on 14th April, 1982. It is contended that, the entire consideration was paid by plaintiff to defendant on the date of agreement and possession was also given. It is contended that partition was subsequently effected and the memo of partition was prepared on 25th October, 1983 and then these four brothers (heirs of one deceased-brother and three brothers) applied to City Survey Office and got entered their names in the record of City Survey.

5. It is contended that, the sale deed was to be executed after entering the name of defendant in record of rights and so after entering the name, plaintiff contacted the defendant and requested him to execute the sale deed. It is contended that, defendant avoided to execute the sale deed under one or the other pretext. It is the case of the plaintiff that, he was always ready and willing to perform his part of contract and nothing was to be done by him as entire consideration was paid by him. The suit came to be filed in the year 1986.

6. The defendant – Yashwant filed written statement and after his death the present appellants filed separate written statement. It is the case of the defendants that, there was no agreement between the plaintiff and defendant – Yashwant and no consideration was paid by plaintiff to Yashwant for purchasing the share of Yashwant. They have, however, admitted that the four branches had applied to City Survey Office for entering their names in the record and partition had taken place amongst these four successors of original owner. However, they have denied that the memo of the partition was prepared. It is contended that, if the agreement was made on 14th April, 1982, the suit filed in the year 1986, cannot be said to be filed within limitation. They have contended that, behind their back the plaintiff took possession illegally of the portion which had come to

share of Yashwant. The L.Rs. of Yashwant have contended that there was no legal necessity to Yashwant for selling this property and Yashwnat could have sold at the most 1/5th share as it was an ancestral property.

7. The issues were framed in the trial Court and both the sides gave evidence. The trial Court has held that the plaintiff has proved that there was agreement of sale between him and defendant – Yashwant. The trial Court has further held that the plaintiff has proved that he had paid entire consideration of Rs. 12,000/- to Yashwant and he was ready and willing to perform his part of contract. Both the Courts below have held that the plaintiff is entitled to relief of specific performance of contract.

8. It appears that, on the basis of the evidence of the plaintiff, two documents, which can be called as agreement and one memo of partition, were exhibited and accepted in evidence by the trial Court. On these documents, Yashwant had given thumb impressions and a witness had identified the thumb impressions. There was signature of a son of Yashwant on agreement, Exh. 60, but this son Ramesh is not examined even when the trial Court gave exhibits to the documents. The partition memo was signed by the three brothers and nephew of

deceased brother of plaintiff. Even the agreement of sale bear the signatures of Ramchandra, who is brother of the plaintiff. During cross-examination, the defendant, son of Yashwant has admitted that, this document bears the signatures of Ramchandra. This document was confronted to the said defendant during the cross-examination.

9. The evidence given by both the sides show that the property had come to the father of plaintiff from the grandmother of the plaintiff. Small portions of the house property had come to shares of 4 branches. The evidence on record shows that, Yashwant and his family had shifted to other place. They also admit that, the plaintiff has been in possession of this portion though they contend that the plaintiff took possession illegally, behind their back.

10. The plaintiff has given evidence that, Yashwant had legal necessity and being Karta of his own family, sold the said property to the plaintiff. This property is adjoining to the property which had come to share of plaintiff and it can be said that for convenience of each other, the shares were given accordingly. The circumstance that, giving of application by these four branches to the City Survey Office thereby informing that the partition had taken place, is admitted by the defendant. The circumstance that, the document of agreement bears

signatures of one son of Yashwant shows that, they had no objection. They are not in possession and they did not take any steps to recover the possession of the suit property from the plaintiff.

11. The ld. Counsel for appellant submitted that, the aforesaid three documents (Exh. 60 to 62) were exhibited by the trial Court wrongly when proper evidence for proving the execution was not given. This submission cannot be accepted at this stage. From the record, it can be said that, the defendants did not object to giving of the exhibits to these three documents. The first appellate Court has referred the decision of the Hon'ble Apex Court in the case of **P.C. Purushothama Reddiar v. S. Perumal** reported in AIR 1972 SC 608. On the basis of observations made by Apex court, the first Appellate Court held that the objection regarding the admissibility of aforesaid documents cannot be considered as it was not taken at the earliest stage. There was virtually no room for the defendants to object or to give evidence to the contrary. The circumstance that, these four brothers had applied to City Survey Office is admitted fact and it can be said that the document like the partition memo must have been produced. For effecting partition, separate portions are required to be shown. In view of all these circumstances, this Court holds that, the

objection regarding the admissibility of aforesaid documents cannot be considered in Second Appeal.

12. In view of the aforesaid circumstances, this Court holds that it is not possible to formulate any substantial question of law. In the result, the appeal stands dismissed.

13. In view of disposal of main appeal, nothing survives for consideration in the connected civil application and same stands disposed of.

[T. V. NALAWADE, J.]

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