

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

**SECOND APPEAL NO. 460 OF 1993
WITH
CIVIL APPLICATION NO. 4559 OF 1993**

1. Suryabhan S/o Mahadu Shinde,
Age- 35 years, Occupation: Service,
Resident of Kolgaon, Taluka Shrigonda,
District Ahmednagar.
2. Rangnath S/o Mahadu Shinde,
Age- 65 years, Occupation- Agriculture,
Resident of Kolgaon, Taluka Shrigonda,
District Ahmednagar.
Since deceased through L.Rs.
- 2-a) Smt. Rakhambai Rangnath Shinde,
Age:55 yrs., Occu. Agril.,
- 2-b) Vishnu Rangnath Shinde,
Age- 46 years, Occu. Agril.
All R/o Kolgaon, Ta. Shrigonda,
Dist. Ahmednagar

...APPELLANTS
(original Defendants)

versus

Hirabai Raghunath Kakade,
Age-43 years, Occupation : Agriculture,
Resident of Kolgaon, Taluka -Shrigonda,
District Ahmednagar

...RESPONDENT
(original Plaintiff)

.....
Mr. V.S. Bedre, Advocate for appellants
Mr. N.B. Suryawanshi, Advocate for respondent
.....

**WITH
CIVIL APPLICATION NO. 925 OF 2003
IN
SECOND APPEAL NO. 460 OF 1993**

Hirabai Raghunath Kakade,

...APPLICANT

VERSUS

Suryabhan S/o Mahadu Shinde and other

...RESPONDENTS

...
Mr. N.B. Suryawanshi Advocate for applicant
Mr. V.S. Bedre, Advocate for respondents
...

CORAM : SUNIL P. DESHMUKH, J.

DATED : 8th DECEMBER, 2015

ORAL JUDGMENT :-

1. This is defendants' second appeal aggrieved by decree passed in favour of the plaintiff at appellate stage, after the suit had been dismissed by the trial court, seeking specific performance of agreement of sale dated 30th June, 1974 and possession.

2. Plaintiff's case is that the defendants agreed to sell a piece of 5 acre land to her from land gut No.546 situated at Kolgaon, Taluka-Shrigonda, District – Ahmednagar, for a consideration of Rs.5,000/-. The land was owned by the defendants No. 1 and 2 and on the date of agreement of sale, they had been paid Rs.4000/-. The agreement of sale was reduced into writing and had been attested by two witnesses and had been signed by defendants No.1 and 2. Pursuant to the agreement of sale, rest of the amount of Rs. 1000/- was to be paid subsequently and that the sale deed was to be executed upon permission from concerned authorities. The same was to happen within a period of one year or on obtaining permission for sale from concerned authority. Subsequently, on 8th October, 1974, the balance consideration of Rs. 1000/- was paid to the defendants and the same had been duly acknowledged by them and had been attested by witnesses. However, for quite some time thereafter, as defendants had

not been making any movement for execution of sale deed, plaintiff was constrained to institute suit for specific performance and alternatively seeking refund of the amount paid.

3. The suit was resisted by the defendants, contending that intention underlying the agreement of sale was not to give any interest to the plaintiff in the property, but the real nature of the transaction was that of a money lending. According to them, father of the plaintiff had been indulging in money lending business and the agreement of sale was executed with an expectation that loan would be advanced in future by father of the plaintiff. They denied delivery of suit property in possession of the plaintiff. Defendants referred to certain names and circumstances in order to buttress their contention about transaction being of money lending.

4. Based on the pleadings, the trial court framed issues with regard to execution of agreement of sale, payment of consideration, entitlement of plaintiff for specific performance, about refund of amount to her in the alternative and whether the defendants prove that the transaction was of money lending.

5. With reference to the evidence adduced, the trial court considered that the agreement of sale had been duly executed, amount of consideration agreed upon had also been received and acknowledged by the defendants, however, answered in negative the entitlement of the plaintiff for specific performance and had considered the transaction to be of the nature of money lending. In the circumstances,

the trial court granted decree of refund of the amount along with 6% interest.

6. In the appeal at plaintiff's instance, the appellate court framed points for consideration, about entitlement of plaintiff to specific performance and whether the judgment of the trial court required interference. The appellate court found plaintiff to be entitled to specific performance of the agreement of sale and that the judgment of the trial court deserves to be reversed.

7. While admitting second appeal, this court had framed a question observing that:-

"Section 20 of the Specific Reliefs Act involves substantial question of law."

8. Learned advocate for appellants – original defendants No.1 and 2 purports to put heavy thrust on the contention that the plaintiff had failed to aver readiness and willingness to perform her part of the agreement, as is obligated under section 16 (1) (c) of the Specific Relief Act, 1963.

9. It is further being contended that the intention underlying the agreement of sale was to enter into a money lending transaction and that the same is amply borne out from the evidence on record. Presence of plaintiff's father all through the transaction is indicative of real nature of the transaction to be money lending. According to learned advocate for the appellants, it has been established that father

of the plaintiff had been indulging in money lending transactions.

10. According to learned advocate for the appellants, the plaintiff cannot be said to be entitled to specific performance, it being discretionary relief and the same having been exercised by the trial court in favour of the defendants, it ought not have been altered at the appellate stage. Learned advocate for the appellants-defendants goes on to submit that the appellate court committed grave error in meddling with the discretion exercised by the trial court, getting carried away by considerations which were not germane and which had neither been pleaded nor had emerged from record. For said purpose, he refers to the observations of the appellate court about plaintiff being deserted woman and that the money with her, been paid to her on account of maintenance.

11. He contends that it cannot be said that the suit had been moved expeditiously. Such a circumstance would be required to be considered and ought to go against the plaintiff, for, suit has been filed quite belatedly, just before expiry of three years from the date of purported agreement of sale.

12. He further submits that the agreement does not bear any reason or purpose for which the transaction has been entered into by the defendants with the plaintiff. It is further being contended that the plaintiff has failed to prove delivery of possession of the suit property pursuant to the alleged agreement of sale or further dispossession as contended under the amendment to the plaint during the course of the

suit. According to him, all these facets which have emerged on record clearly disentitle the plaintiff from seeking specific performance which on appreciation of first hand evidence, the trial court had rightly refused.

13. He submits that the plaintiff on one more count is not entitled for specific performance of agreement of sale, for, the suit land had been transferred in favour of sons and nephews of the defendants and that they were not made parties, which had rightly been taken into account by the trial court and had refused to grant specific performance.

14. Learned advocate for the defendants purports to derive support to his proposition about absence of averments in the plaint regarding readiness and willingness to perform her part of agreement disentitling from seeking specific performance, from a judgment reported in *AIR 1979 Bombay 208 Bhaurao Shamrao Bhalme and others Vs. Mahadeo Raghu Yelekar*. It appears to be a case with reference to facts that the plaint did not contain any averment to the effect that plaintiffs being ready and willing to perform their part of the agreement and that reliance for said purpose was being placed on one notice. It was a notice issued by one Narayan, who on the date of suit was not alive and the suit was filed by his relatives. Under the circumstances, the court appears to have considered that in absence of averments by the plaintiffs in the plaint, about them being ready and willing to perform their part of contract, evidence adduced in that respect being silent, for such a deficiency specific performance could not have been granted in favour

of the plaintiff. Said case does not appear to be in any way close to the facts of the present case.

15. Learned advocate for the defendants also presses into service for said purpose, a decision in *Manjunath Anandapa Urf Shivappa Hansi Vs. Tammanasa and others*, reported in *AIR 2003 Supreme Court, 1391* which was a case wherein apart from absence of averments there was no tender of balance amount of consideration within a period of three years from the date of agreement. The notice issued had been considered to be not satisfying mandatory requirements of section 16(c) of the Specific Reliefs Act, 1963 and the notice was served upon power of attorney holder of defendants, whose power had already been revoked by the defendants. Said case as well is different on facts from present one.

16. The other case relied upon on behalf of the defendants is reported in *1997 (2) Mh.L.J. 642 (K. S. Vidyanandam and others vs. Vairavan)*. That was a case wherein, in the agreement of sale of a house for consideration of Rs.60,000/- plaintiff had parted with Rs.5000/- and had agreed to pay balance amount within six months and to bear expenses of sale deed. However, for about two and half years, he had not paid balance consideration and subsequently purported to issue notice asking for execution of sale deed. The court noticed that prices in the locality had gone up three times and it is in that context the court had considered that lapse of two and half years in the circumstances precluded granting specific performance.

17. Learned advocate for the defendants lays heavy stress on a decision reported in *AIR 1994 Bombay 124 (Vasudeo Harchand Kolhe and another Vs. Bhaulal Nadarsingh Rajput and another)*, particularly for that the decree of specific performance could not have been granted, since suit land stands now in the name of sons and nephews of defendants. According to learned counsel, the situation would be similar to the one as has been involved in the reported case wherein suit land was sold during pendency of suit by other party, and court had refused to grant specific performance. However, it would be required to be considered that for the reason that the plaintiffs were aware of negotiations being going on for alienation of property by defendants about the time when suit was instituted, and yet the plaintiffs had not prayed for necessary relief to prevent such event/action. In the present matter, however, there is no such pleading or defence been taken that suit land had been in the name of sons and nephews, nor pressed into service hitherto.

18. Learned counsel for respondent- plaintiff, on the other hand, submits that position clearly emerges on record that there is due acceptance of the execution of agreement of sale and contents thereof. Although, suit is being defended on the sole ground that parties having had different intention, viz; money lending, the same cannot be said to be supported by any credible material. He submits that it has come on record that under agreement of sale plaintiff had parted with Rs. 4000/- on the date of agreement and subsequently paid Rs. 1000/-, thus making up total consideration as agreed upon. In the circumstances, according to him, she had sufficiently established her

readiness and willingness to purchase the property pursuant to agreement of sale and although under terms of the agreement registration expenses were to be shared equally, the defendants refused bear their share in the same in order to avoid performance of agreement, yet the plaintiff in pleading had shown her readiness and willingness to bear entirely registration expenses. As such, ground being taken about absence of averments with regard to readiness and willingness is devoid of any substance. Pursuant to the terms of the agreement, in fact, the plaintiff had unequivocally agreed to perform her part of contract and the same clearly appears in the plaint paragraph No. 2. In the circumstances, it cannot be said that there is no specific compliance of section 16(1)(c) of the Specific Relief Act, 1963.

19. He submits for overcoming their weakness, defendants had sought to develop strange and unbelievable theory that document had been executed in contemplation of loan to be advanced in future contending that father of the plaintiff is a habitual money lender. He submits that besides bare words and so called evidence by one of the real brothers of defendants no evidence is adduced to substantiate said theory. Even said evidence is feeble and cannot connect to the agreement to sell concerned. Such interested version falls very short to establish that father of the plaintiff was a money lender.

20. Learned counsel submits that conspicuous conduct of defendants is also worthy to be noted. None of the defendants had made themselves available for examination in-chief in defence since they had

no courage to face cross-examination. Real brother of defendant no. 2 had been examined, who purportedly tried to establish that father of the plaintiff was a money lender, by producing a receipt of payment of amount to plaintiff's father. He submits that said transaction cannot be related to transaction in the present matter. Presence of father of the plaintiff with her had been inevitable in the face of the grave hardship faced by the plaintiff due to desertion by her husband. She had to have independent personal source and security. With such an intention property was purchased.

21. The learned counsel for plaintiff submits that very defence taken by defendants had been vacuous and totally unrelated to the matter. It is also not a case that money had been paid by father of the plaintiff. The case that has been put forward, in fact, was that money would be received in future if such transaction is entered into. Theory itself is unreliable, according to him, out side ordinary prudence of man. He submits that plaintiff was lady and had not been aware of the procedure after purchase of the property and had not moved to have her name mutated in the record maintained by the revenue office. She realized necessity of the mutation only after she had been dispossessed. It is submitted that agreement may not be necessary to be taken on record in revenue entries. He, therefore, submits that non appearance of the name of plaintiff, in revenue record, after agreement had been executed is under the circumstances referred to above, however, that alone would not deprive her right of specific performance of contract. He submits that it is ordinary rule that specific performance

should be granted and can be refused only in the circumstances damages would constitute adequate relief.

22. He further refers to section 10 of the Specific Reliefs Act, 1963 explanation (i) wherein it is provided that, '*that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money.*'

23. In support of his submission, learned counsel for respondent places reliance on the decision of the Supreme Court reported in *AIR 1979 Supreme Court 1241 (Prakash Chandra Vs. Angadlal and others)* and as can be gathered from the set of facts therein, case appears to be that an agreement for sale had been executed by M and Q in favour of appellant on 11-09-56. Subsequently, M informed the appellant of the pendency of suit between himself and certain others, including U and S for declaration of title and for possession. Thereupon the appellant executed further document on 18-11-57 by which he agreed that in case the above said suit resulted in a settlement confirming M's ownership and allowing him possession of the site in question, the appellant would pay balance of the consideration as agreed earlier and would obtain a sale deed from him according to the earlier agreement for sale, but in case the settlement did not so result he would be entitled to the refund of the amount already paid by him. The above said suit was compromised and in terms of compromise the suit was decreed in favour of M and Q for title and possession, under default committed by U in making payment to M and Q as per the compromise. After the above said default and before the decree was passed, M and

Q executed sale deed dated 06-12-1957 in favour of first and second respondents.' In the circumstances, the Supreme court had concluded that appellants were entitled for decree of specific performance and high court's decision of refusing specific performance had been reversed.

24. In the present matter, it would be required to be noted the situation is that entire consideration has been paid and duly acknowledged. It is a contention put forward by defendants to defend the suit that source for purchase of the property has not come on record. Source for payment of consideration would hardly affect the intention of the parties while entering into contract. Contention of defendants that there is no reason for sale of the land is also vacuous, for, there is no prohibition under law that property cannot be purchased unless it is needed to be sold. Such a consideration is absolutely unwarranted and trial court has unnecessarily got carried away by considerations which were not relevant.

25. The trial court had been dithering in appreciation of evidence. It has considered that agreement has been duly executed and yet went on to consider that intention was of money lending based upon a very fragile foundation. While appreciating the pleadings by the plaintiff the appellate court has quite elaborately considered that it cannot be said to have been established that plaintiff's father is money lender and that the agreement entered into between the parties was in the nature of money lending transaction. The appellate court has also considered that no similar transactions have been placed on record by the

defendants in order to support their contention that plaintiff's father had been money lender save and except evidence by brother of defendant No. 2. Solitary receipt produced by interested person in absence of evidence of defendants themselves or any other cogent material on record cannot be said to have established that plaintiff's father was doing money lending business.

26. Broadly, the two courts have had differing views on the intention of the parties while entering into agreement of sale.

27. The appellate court has also considered that having regard to plaintiff being deserted lady, it was quite natural for her to come along with her father. The appellate court has also considered that no adverse inference against the plaintiff can be drawn for presence of her father.

28. Submissions of learned counsel for the appellants about section 20 of the Specific Relief Act, 1963 have also been taken care of in the findings/observations by the appellate court, referring to that there is nothing on record indicating that the plaintiff is either in a position or has taken undue and unfair advantage over the defendants, for specific performance of contract in favour of plaintiff.

29. In the course of arguments, learned counsel for appellants purported to contend that the amount of Rs. 5000/- for about five acres land is too meagre which appears to be unconscionable. Nothing is placed on record to show that land prices in the area were then higher than paid by plaintiff. However, one may have to consider that

transaction is of 1974, at that time land prices were not so high as are seen today. In any case provisions under Specific Relief Act, 1963 do not detain a decree on the ground of inadequacy of amount.

30. Submission of the learned counsel for the appellants that decree cannot be executed, for, the land had been transferred to sons of the defendants and that plaintiff was aware of the same, is a matter absolutely outside the pleadings and defence. If such transfer has taken place, which had not been pleaded, the same would be covered by doctrine of *lis pendens*. In absence of such pleadings, said arguments would hardly be able to arrest the decree for specific performance of contract rightly claimed by the plaintiff and granted by appellate court. Citation in the case of *Vasudeo Harchand Kolhe (supra)* pressed into service as has been already referred to hereinabove earlier was in different set of facts. It is not a case in the present matter that before the suit had been instituted, any such transfer had ever having taken place or had been hinted/indicated and had not ever been pleaded in defence.

31. In present case, there are concurrent findings about agreement of sale having been duly executed and entire consideration having passed on to defendants. The appellate court, the last fact finding court, had considered the evidence observing that not only agreement of sale had been proved and entire consideration had been paid, but also found that plaintiff had unequivocally averred about her readiness and willingness, as against consideration which had been answered in the negative by the trial court.

32. Averments in the plaint which have been referred to along with other facts are clear indication of that the plaintiff had not only shown her to be ready and willing but also appears to have stated so in the pleadings. In such a case, absence of specific reference to section 16 of the Specific Relief Act, 1963 would not mean that there was no compliance of the requirement under the same.

33. The appellate court has also adverted to that transaction in respect of witness Mahadu Shinde is not in any way related to transaction in question. The appellate court has considered that evidence on record is eloquent to throw light on the intention of the parties while entering into agreement of transfer of property.

34. In such a case and having regard to the facts of the case, the discretion which has been exercised by the appellate court in favour of the plaintiff appears to be sound, reasonable and guided by judicial principles. In the facts and circumstances, it cannot be said to be a case covered under any of the sub- clauses (a) (b) (c) of sub-section 2 of section 20 of the Specific Relief Act, 1963. The transaction has been in respect of immovable property. Defence about contemplated loan has not been established. Consideration having flown and paid to the defendants has been duly established. Intention of the parties having been reduced into writing and duly proved, findings by the appellate court cannot be said to be not adhering to the facts and discretion so exercised by the appellate court is capable of being exercised and cannot be said to be erroneous.

35. In view of aforesaid, substantial question of law stands answered accordingly and second appeal stands dismissed.

36. It has to be considered that despite order by the high court to pay Rs. 1000/- per year to the plaintiff, the defendants are stated to have committed defaults after initial few years. As such, amount in default may well be recovered by the plaintiff by following due course of law.

37. Pending civil applications stand disposed of accordingly.

Sd/-

(SUNIL P. DESHMUKH, J.)

MTK
