

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

SECOND APPEAL NO.372 OF 2014
WITH
CIVIL APPLICATION NO.6291 OF 2014

1. Raju Satoba Wabale,
Age Major, Occu. Agri.,
 2. Bhausahab Satoba Wabale,
Age Major, Occu. Agri.,
- R/o Wabalewadi, Taluka Rahuri,
District Ahmednagar

..Appellants
(Orig. Defendants No.3 & 4)

Versus

1. Ratanbai Dhondiram Narwade,
Age Major, Occu. Agri.,
R/o Ward No.2, Shrirampur,
Taluka Shrirampur,
District Ahmednagar
2. State Bank of India
Its Manager, Taharabad,
Taluka Rahuri,
District Ahmednagar
3. Gopinath Janku Hulwale,
Age Major, Occu. Agri.,
R/o Ghodegaon, Taluka Newasa,
District Ahmednagar

..Respondents
(Resp.No.1 Orig. Plaintiff
& Resp.Nos.2 and 3 orig.
defendants No.1 and 2)

Mr S.P. Chapalgaonkar, Advocate h/f Mr S.S. Chapalgaonkar, Advocate
for appellants
Mr D.G. Nagode, Advocate for respondent No.1

CORAM : N.W. SAMBRE, J.**DATE : 10th July 2015****PER COURT**

1. This appeal is by original defendants No.3 and 4 to Special Civil Suit No.227 of 1997 which was preferred by respondent No.1 herein for specific performance of contract before the Court of Civil Judge, Senior Division, Ahmednagar questioning the judgment and decree passed by the said Court on 28th April 2003 ordering specific performance of contract, which was further affirmed in an appeal under Section 96 by the District Judge-4, Ahmednagar on 3rd April 2014.

2. The facts as are necessary for filing of the present appeal are as under :

3. The respondent No.1 - original plaintiff urged before the trial Court that the defendant No.1 i.e. respondent No.3 to the present appeal was owner of the suit property, who entered into an agreement of sale with the respondent No.1 - plaintiff for a consideration of Rs.1,20,000/- and received Rs.20,000/- towards earnest amount vide agreement dated 6th March 1997. It is further claimed that the suit property was sought to be transferred by defendant No.1 in favour of third party. It is further claimed that the defendant No.1 raised loan of Rs.80,000/- against the suit property from the original defendant No.2 - Bank.

4. Since the defendant No.1, pursuant to above agreement has failed to perform his part of contract and plaintiff was always ready and willing to perform her part of contract as such was present in the office of the Sub-Registrar, Rahuri on 2nd July 1997, for getting the sale-deed executed in her favour. The defendant No.1 intentionally remained absent, the same has prompted her to file the suit.

5. The respondent No.1 then noticed that during pendency of the suit, the original defendant No.1 executed sale deed of 1 hectare 52-R land on 16th December 1997 in favour of defendants No.3 and 4 i.e. present appellants. As such, amended the plaint and sought declaration that the sale-deed in favour of defendants No.3 and 4 be declared as null and void.

6. The defence that was raised by the defendant No.1 - owner was that the property was received by him from a common ancestor viz. Sonabai Gajaram and it being a joint family property, he had no right to transfer the property in question.

7. It is further claimed by the defendant No.1 that property was mortgaged against the loan with defendant No.2 - Bank and as the same could not be repaid by defendant No.1, the recovery suit was filed by the Bank. So as to satisfy the said loan, defendant No.1 claimed that he demanded Rs.20,000/- from the father of the plaintiff and as such, agreement in question was a loan transaction out of said advance of Rs.20,000/-. He further claimed that the said agreement

with the plaintiff was never acted upon and he was always ready and willing to return the amount of Rs.20,000/-. It is also claimed by him that the agreement in question was executed, so as to avoid the attachment of property of defendant No.1 by the Bank. The defendant No.2 Bank has filed its defence at Exh.32. It is claimed by defendant No.2 - Bank that as the defendant No.1 has committed default in repayment of loan amount, as the said property was mortgaged against the loan transaction, which has prompted the Bank to file Regular Civil Suit No.700/1994 and the property in question was attached by the Court on 11th August 1997. The present appellants, defendants No.3 and 4 raised objection about the non-agricultural status of the plaintiff-respondent No.1 herein. It is also claimed that the loan amount which was raised by defendant No.1 and the recovery proceedings to that effect pending against the defendant No.1, initiated by defendant No.2 Bank, property was subjected to attachment and, therefore, to avoid said attachment the nominal agreement between the plaintiff and defendant No.1 was executed. It is further claimed that agreement for sale was executed in between the plaintiff and defendants for a consideration of Rs.1,15,000/-. It is also claimed that appellants got the sale-deed executed in their favour of the suit property, however, they are *bona fide* purchasers and sought dismissal of the suit.

8. Learned trial Court framed following issues and answered the same accordingly:

<u>ISSUES</u>	<u>FINDINGS</u>
1. Does plaintiff prove that defendant No.1 has agreed to sale suit property to him and to that effect executed an agreement to sale on 6/3/97 by way of accepting earnest amount of Rs.20,000/- ?	In the affirmative
2. Do defendant Nos.3 and 4 prove that disputed document is a hallow document only created for the purpose of avoiding bank attachment ?	In the negative
3. Does plaintiff prove that he is in possession of suit property on the strength of an agreement to sale ?	In the affirmative
4. Whether plaintiff is ready and willing to perform part of his contract ?	In the affirmative
5. Do defendant Nos.3 and 4 prove that they are <i>bona fide</i> purchasers for value without notice ?	In the negative
6. Whether plaintiff is entitled for decree of specific performance as prayed ?	In the affirmative
7. What order and decree ?	As per final order

9. The agreement in between defendant No.1 and the plaintiff at Exh.113 was looked into by the Court below so as to find out whether it was a sale transaction or not. While doing so, learned trial Court has taken into account the testimony of P.W.2 Appasaheb Nehe who is witness to the said document. The said witness, in clear terms, has narrated that the agreement qua Exh.113 was executed on 6th March 1997 and was to be taken to its logical end. He has stated in detail about the transaction and the balance consideration was to be paid by the plaintiff within four months. It is also stated that one Madhukar has scribed the document and also narrated names of other witnesses to the document Exh.113. In his cross-examination, nothing could be elicited in support of the defendants. So far as the witness P.W.3 Madhukar Shripatrao Udmale is concerned, he has proved the execution of document Exh.113. In clear terms he has stated that the plaintiff has paid Rs.20,000/- to defendant No.1.

10. The another witness who was present at the time of agreement was P.W.4 Chintaman Narayan Raut whose testimony also supported in the matter of execution of document in question. It is noted by the learned trial Court that the defendant No.1 was in need of money to discharge the loan and, therefore, he sold the land to defendants No.3 and 4 for a consideration of Rs.2,30,000/-. D.W.2 Dada Nehe and D.W.3 Gorakshnath stated about the possession of defendants No.3 and 4 and about moving an application for grant of electric meter and agreement between the Mula Pravara Electric Co-operative Society.

11. One of the important aspect of which the Court has taken note of is that the defendant No.1 avoided to depose in favour of either of the parties by entering into witness box. The witness P.W.1 Dhondiram, P.W.2 Appasaheb and P.W.4 Chintaman have stated in support of possession of the plaintiff over the suit property. The revenue entries Exhs.95 and 96 were taken into account as regards the possession of the plaintiff over the suit property.

12. So far as the aspect as regards readiness and willingness of the original plaintiff to perform her part of contract is concerned, notice Exh.89 demanding execution of the sale deed from defendant No.1 was also proved. The notice was also issued to defendants No.3 and 4 on 25th June 1997 at Exh.91 and she has deposited Rs.1 lakh towards balance amount of consideration. From the above conduct of the appellants, the Court inferred from the evidence that the plaintiff was ready and willing to perform her part of contract. The Court noted that the notice Exh.91 was issued to the present appellants as regards pendency of the suit in question, still the appellants have proceeded to purchase the property in question.

13. In the above background, learned Counsel for the appellants Mr Chapalgaonkar would urge that the requirement of Section 16 of the Specific Relief Act was not at all satisfied by the original plaintiff that is to say the issue as regards readiness and willingness was not established. In addition to above, he has also tried to urge that perverse findings are recorded by both the Courts below. According

to him, the documents which are not brought on record before trial Court and documents, which are not public documents within the meaning of Section 74 of the Evidence Act were relied upon by the Court below, for deciding the issue and dismissing the appeal of the appellants. According to him, this could be termed as question of law.

14. Having discussed in detail the observations made by learned trial Court, in my opinion, the analysis of the learned trial Court was subjected to an appeal bearing Regular Civil Appeal No.182/2003. The learned lower appellate Court noted that in spite of the notice issued by the plaintiff, the defendant No.1 avoided to execute the sale deed pursuant to agreement Exh.113. Just because the defendant No.1 was getting some higher amount, he has proceeded to execute the sale deed i.e. on 16th December 1997 in favour of present appellants – defendants No.3 and 4 which was during pendency of the suit. The defendants No.3 and 4 as such were added to the suit. Before purchase of the suit property by the present appellants, the plaintiff had issued notice Exh.91 to defendants No.3 and 4 intimating them about the earlier transaction i.e. agreement Exh.113. In view thereof, in my opinion, it will be inappropriate to hold that the present appellants are purchasers of suit property with notice.

15. So far as the issue as regards readiness and willingness is concerned, it is required to be noted that as per the agreement Exh.113, the total period for completing the transaction in question for four months. A notice to that effect was served on the present

appellants demonstrating readiness and willingness of the plaintiff about her part of contract. The plaintiff had also submitted the blank stamp paper of Rs.20/- which is produced at Exh.97 which indicates that she had purchased stamp paper for the purpose of execution of sale deed on 2nd July 1997. In addition to above, the plaintiff has deposited the balance amount of consideration Rs.1 lakh in the Court so as to demonstrate her readiness and willingness to get the sale deed executed. Apart from above, the plaintiff has also attended the office of the Sub-Registrar for getting the sale deed executed to which the defendant No.1 has not responded. As such, in my opinion, the plaintiff has discharged burden as regards Section 16 of the Specific Relief Act about readiness and willingness.

15. So far as the aspect as regards the acceptance of the document by the appellate Court is concerned, particularly, which according to the appellants has no colour of public document in tune with Section 74 of the Evidence Act, it is required to be noted that the respondent No.1 - plaintiff has already proved the execution of the agreement Exh.113. In view thereof, acceptance of the said document by the appellate Court, in my opinion, will have hardly any bearing over the merits of the appeal, as apart from the said document also it could be inferred that the plaintiff was entitled for the decree for specific performance. It is also required to be noted that the appellate Court has appreciated into the entire set of pleadings, evidence and re-appreciated the same by giving verdict in favour of the plaintiff by dismissing the appeal of the present appellants.

16. It is worth to note here that defendant No.1 has not entered into witness box so as to demonstrate that the appellants here are the *bona fide* purchasers. Apart from above, it is required to be noted that the appellants herein were served with the notice Exh.91 prior to the execution of the sale deed in their favour.

17. In view of above, in my opinion, the appeal which is against concurrent findings fails, stands dismissed.

18. In view of dismissal of Second Appeal, pending civil application does not survive and same stands disposed of.

(N.W. SAMBRE, J.)

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