

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

**SECOND APPEAL NO.636 OF 2010
WITH
CIVIL APPLICATION NO. 1716 OF 2010 IN SA/636/2010**

1. Baban @ Adinath Damodar ..Appellants
Purwat, since deceased,
through his L.Rs;
1A. Padminibai Adinath Purwat
and Ors

Vs

Kantilal Ramchandra Garude .. Respondent

Mr. Prasad S. Dani, Senior Advocate, i/b Ashok B. Tajane,
Advocate for Appellants.

Mr. Sham V. Walve a/w Y. P. Londhe, Advocate for the
respondent.

CORAM : R.G.KETKAR,J.
DATE : 18/04/2015

PC:

1. Heard Mr. Prasad S. Dani, learned senior counsel for the appellants and Mr. Sham V. Walve, learned counsel for respondent at length.

2. By this Appeal under section 100 of the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), legal representatives of original defendant no.1 and defendants no.2 to 5 have challenged the Judgment and decree dated 25.8.2010 passed by learned District Judge-1 Pandharpur in Civil Appeal No.38 of 2007. By that order, the learned District Judge allowed the

Appeal preferred by the respondent, hereinafter referred to as 'plaintiff', for specific performance of contract and directed the appellants, hereinafter referred to as 'defendants', to execute the sale deed in respect of land admeasuring 4 Hectors 44R from eastern side of Gat No.1273, together with the exclusive right in the well and 1/4th share in another well, situate at village Karkamb, Taluka Pandharpur, District Solapur (for short, 'suit land') in favour of the plaintiff in accordance with the agreement of sale dated 2.4.1982. The defendants were also directed to pay necessary charges required for execution and registration of the sale deed and to put the plaintiff in possession of the suit land. It was further provided that if the defendants failed to execute the sale deed, the plaintiff will be at liberty to get the sale deed subject to payment of remaining consideration of Rs.10,000/- to the defendants. If the plaintiff failed to pay the said amount on or before 30.9.2010, the suit was to stand dismissed. The learned District Judge also dismissed the cross objections preferred by the defendants.

3. In support of this Appeal, Mr. Dani submitted that the respondent instituted suit for specific performance of agreement of sale dated 2.4.1982 contending, inter alia, that the defendants agreed to sell the suit land for a total

consideration of Rs.45,000/-. Four months prior to execution of the agreement of sale, the plaintiff had paid Rs.30,000/-. On the date of execution of agreement of sale, he had paid Rs.5000/-. Thus, out of total consideration of Rs.45,000/- he had paid Rs.35,000/- as on the date of the agreement of sale. The sale deed was to be executed within two years, i.e. on or before 2.4.1984. The plaintiff had issued notice on 20.10.1983 calling upon the defendants to remain present in Tahasildar's Office, Solapur for execution of the sale deed. The suit was instituted on 6.2.1984.

4. Mr. Dani submitted that defendant no.1 filed written Statement which was adopted by defendants no.2 and 4. Defendant no.3 filed separate written statement. He submitted that the plaintiff had given hand loan to defendant no.3 who is son of defendant no.1 Agreement was executed as and by way of security for repayment of loan. Defendant no.3 took up the plea that suit land does not belong to defendant no.1 exclusively. The suit land is ancestral property and, therefore, the agreement of sale executed by defendant no.1 alone does not bind other defendants.

5. Mr. Dani submitted that the learned trial Judge, after considering the evidence on record, held that the plaintiff was not ready and willing to perform his part of contract and that

after exercising discretion under section 20 of the Specific Reliefs Act, 1963 (for short, 'Act') held that the plaintiff is not entitled to specific performance. The learned trial Judge partly decreed the suit and directed the defendants to pay Rs.35,000/- together with interest at the rate of 12 % per annum from the date of filing of the suit.

6. Mr. Dani submitted that the learned District Judge, however, proceeded on the premise that the written statement filed by defendant no.1 was not adopted by any of the defendants. The learned District Judge further proceeded on the premise that the written statement of defendant no.1 was having only academic value. The written statement of defendant no.3 is very short, cryptic and vague. Defendant no.3 has totally set up a different case. He submitted that the findings recorded by the learned District Judge in paragraph 3 are wholly unsustainable. They are factually incorrect and contrary to record. The Written Statement of defendant no.1 was adopted by defendants no.2 and 4. It, therefore, cannot be said that the written statement filed by defendant no.1 was not adopted by any of the defendants. He further submitted that the learned trial Judge rightly held that the plaintiff was not ready and willing to perform his part of contract and that the learned trial Judge rightly exercised

discretion in refusing to grant relief of specific performance.

7. Mr.Dani invited my attention to paragraphs 24 to 28 in support of his contention that the discretion exercised by the learned trial Judge was judicious and was not either arbitrary or capricious. The learned District Judge was, therefore, not justified in interfering with the discretion exercised by the learned trial Judge. Lastly Mr.Dani submitted that the plaintiff is not an agriculturist and even on this count the learned District Judge was not justified in decreeing the suit for specific performance.

8. On the other hand, Mr. Walve supported the impugned order. He submitted that the learned trial Judge rightly held that the plaintiff had proved that after accepting earnest amount of Rs.35000/- from time to time, defendants no.1 to 4 agreed to sell the suit land by agreement of sale dated 2.4.1982. He submitted that the learned trial Judge committed error in holding the plaintiff was not ready and willing to perform his part of contract. He submitted that the agreement of sale was executed on 2.4.1982 and the sale deed was to be executed within two years i.e. on or before 2.4.1984. Even before expiry of this period, the plaintiff had given notice on 20.10.1983 and instituted suit on 6.2.1984. He, therefore, submitted that the learned District Judge rightly held that the

plaintiff was and is ready and willing to perform his part of contract, more so out of total consideration of Rs.45,000/-, the trial Court also held that the plaintiff had paid Rs.35,000/-.

9. Mr. Walve submitted that the learned District Judge rightly held that the trial Court did not properly exercise discretion under section 20 of the Act. In fact, the defendants did not take up the plea that as the plaintiff is not an agriculturist, relief of specific performance cannot be granted. He, therefore, submitted that Appeal does not involve any substantial question of law.

10. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, defendant no.1 had executed the agreement of sale on 2.4.1982 for a total consideration of Rs.45,000/-. The learned trial Judge held that the plaintiff had established payment of Rs.35,000/-. The learned trial Judge, however, held that the plaintiff was not ready and willing to perform his part of contract. As against this, the learned District Judge held that the plaintiff was and is ready and willing to perform his part of contract. I do not find that the learned District Judge committed any error in that regard. Though the sale deed was to be executed on or before 2.4.1984, the plaintiff had issued notice on

20.10.1983. The plaintiff called upon the defendants to remain present before the Tahasildar's Office for executing the sale deed. The suit was instituted on 6.2.1984. The learned District Judge, therefore, rightly held that the plaintiff was vigilant in getting the sale deed executed by paying the remaining amount

11. The learned trial judge discussed the issue of discretion under section 20 of the Act from paragraph 24 onwards. The learned trial Judge rightly observed that relief of specific performance is a discretionary relief. The Court is expected to use discretion judiciously and not arbitrarily. The Court should not grant relief of specific performance merely because it is lawful to do so. The learned trial Judge observed in paragraph 26 that firstly the parties never intended to act upon the agreement of sale because though major part of consideration was paid, possession of the suit land was not handed over to the plaintiff. Secondly, the plaintiff in his cross examination admitted that on 26.7.1983 the defendants insisted for execution of the conditional sale deed. As against this, the plaintiff was insisting for execution of an out and out sale deed. The learned trial Judge also considered in paragraph 27 that the amount of Rs.30,000/- was taken and spent by the defendants for development of agricultural land

and this fact does not appear to be probable and reasonable and shows that the agreement of sale was not intended to be acted upon. In my opinion, the learned trial Judge was not justified in holding that the party never intended to act upon the agreement of sale. The learned trial Judge further noted in paragraph 28 that there was encumbrance of cooperative society on the suit land and if the land is transferred, the said transfer is void under the Maharashtra Cooperative Societies Act, 1960. The said finding is totally perverse. The defendants cannot take shelter of that ground and it is only that society who can challenge the said transaction. That apart, the learned District Judge noted that the plaintiff had paid dues of the Bank and to that effect produced receipts at Exhibits 33 to 35. It, therefore, cannot be said that the transaction between the plaintiff and the defendants violated the provisions of the Maharashtra Co-operative Societies Act, 1960.

12. The learned District Judge, after holding that the plaintiff is ready and willing, considered exercise of discretion in paragraph 19 onwards. In paragraph 20, the learned District Judge noted that defendants no. 1 to 4 executed agreement of sale. They are coparceners and defendant no.1 was Karta. Defendant no.3 had conceded the case put up by the plaintiff.

There is no whisper that the plaintiff had taken advantage of the defendants as also hardship that would be caused to the defendants in case decree for specific performance is passed. The learned District Judge while dismissing the cross objections filed by the defendants came to the conclusion that the defendants failed to prove that the agreement of sale was a money lending transaction.

13. After considering the material on record, I do not find that the learned District Judge committed any error in decreeing the suit. Though Mr. Dani submitted that the plaintiff is not an agriculturist, perusal of the agreement of sale as also plaint indicates that occupation of the plaintiff is described as Agriculturist. In the Written Statement, defendants did not take up the plea that the plaintiff is not an agriculturist. Considering the totality of the circumstances, I do not find that the learned District Judge has committed any error in decreeing the suit for specific performance of contract. The findings recorded by the learned District Judge cannot be said to be perverse, being based upon no evidence, or that they are contrary to evidence on record. In the result no substantial question of law arises in this Appeal. Hence, Appeal fails and the same is dismissed. In view of dismissal of Appeal, Civil Application No.1716 of 2010 for stay does not

survive and the same is disposed of.

14. At this stage, Mr. Tajane orally applies for stay of this order for a period of eight weeks. Mr. Walve opposes this application on the ground that there was no stay pending admission of Second Appeal since 2010 and they have already filed Darkhast proceedings. In view thereof, oral application made by Mr. Tajane is rejected.

(R.G.KETKAR, J.)