

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

907 SECOND APPEAL NO. 336 OF 2015

**WITH
CA/8248/2015
IN
SA/336/2015**

**HOUSABAI SAHADU DHADGE
DIED LRS BABAN AND OTHERS**

VERSUS

**CHANDRAKANT DAMODHAR RAHATEKAR
AND OTHERS**

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Mr. M.S.Deshmukh h/f Mr. A.S.Gandhi,
Advocate for Appellants.

Mr. Ajinkya Kale h/f Mr. A.V.Hon,
Advocate for R -1& 3.
2-A to 2-E, 6.

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CORAM : T.V.NALAWADE, J.

DATE : 16th JUNE, 2016

ORDER :-

. The Appeal is filed to challenge the Judgment
and Decree of R.C.S. No. 305/1997 which was pending in the

Court of the Civil Judge [Sr.Division], Kopargaon and also to challenge the Judgment and Decree of R.C.A. No. 17/2007 which was pending in the Court of the District Judge - 1, Kopargaon. The Suit filed for specific performance of contract of sale of immovable property is dismissed. Heard Both sides.

2. It is the case of appellant/plaintiff that 7 R. portion of land G.No. 312 situated at village Pimplas, Tahsil Kopargaon, district Ahmednagar was owned by Geetabai, the mother of defendants and defendants and it was their ancestral property. It is contended that deceased Geetabai had agreed to sell this property to plaintiff Hausabai under agreement dated 30/09/1978. It is contended that on that day 2 documents were executed by Geetabai viz. Lease deed for the period of 99 years and agreement to sell the property. It is contended that Hausabai was put in possession of the suit property. It is contended that the sale deed was to be executed after making correction in the revenue record as the property was shown to be owned by Vasant Shelke, though the property was belonging to Geetabai and present defendants. It is contended that entire consideration was already paid and nothing was to be done by the plaintiff till

the correction in the revenue record was made. It is contended that the correction was made by the revenue authority on 25/09/1995 and after that cause of action took place for the Suit. It is contended that the plaintiff requested the defendants, who are successors of Geetabai, to execute the sale deed, but they refused to do so and so the Suit was required to be filed. Relief of specific performance of aforesaid agreement was claimed against the defendants.

3. Defendant Nos. 1 and 3 filed joint Written Statement and they denied the contentions of the plaintiff that Geetabai had promised to sell the property to Hausabai. They denied that the said lady was put in possession by Geetabai under lease document. They contended that Geetabai was simple-tone lady and during temporary absence of the defendants, sons of Geetabai, from their house, false representation was made and by deceiving Geetabai, some documents were got executed from her by the plaintiff. They denied the other contentions also. They filed counter claim for possession of the suit land on the basis of their title.

4. Issues were framed on the basis of the aforesaid pleadings. Both sides gave evidence. Both the Courts below

have held that the agreement made with Geetabai can not be enforced against the defendants as they were co-owners of the property when the agreement was made. The Courts below further held that the plaintiff failed to prove that he was ready and willing to perform her part of the contract. It was held that the possession of the plaintiff was unauthorized and the defendants, the owners, were entitled to get the possession.

5. This Court has carefully gone through the reasonings given by the Courts below. Copy of the disputed agreement [Exh.89] was shown to this Court and it is seen carefully by this Court. This document was executed on 30/09/1978 on general stamp of ₹ 5/-. The contents show that it was executed after execution of the lease deed. The amount of ₹ 2,500/- was shown to be paid to Geetabai under lease document and the amount was shown as entire amount of rent. In the agreement to sale [Exh. 89], it was mentioned that the same amount was to be treated as the consideration for sale of the suit property. It was mentioned that there were technical problems and due to that it was not possible to execute the sale deed and so the lease document was prepared. It was mentioned that within one year the sale

transaction was to be completed. The possession was shown to be given to Hausabai on the same day. The expenses of the sale deed were to be borne by both sides. The execution of this document is held to be proved.

6. It is not disputed that the suit property was owned by Damodhar, husband of Geetabai and father of the present defendants. Thus, the property was owned by Geetabai and all the 6 defendants. It is not the case of the plaintiff that all the 6 defendants, who have share in the property, had given consent or for them also Geetabai had made the agreement. There is no mention about the rights of defendants in Exh. 89. Thus, one member of the joint Hindu family had made the agreement to sell the entire property belonging to 7 members of joint Hindu family. The defendants were not party to the agreement and so there was no privity of contract between the plaintiff and defendants. It was only agreement of sale and could have been executed against Geetabai. During her life time no attempt was made to get the sale deed executed by the plaintiff. In view of these circumstances, the Courts below have placed reliance on the case reported in 2005 SAR (Civil) – 285 (S.C.) - [Shanmughasundaram & Ors. Vs. Diravia Nadar (D) by

L.Rs. & Anr.], wherein it is observed that,

“ One co-sharer has executed an agreement for sale of joint family property owned by other co-sharers also, then vendees are not entitled to obtain sale deed of undivided share of the co-sharers with right to force partition on the other co-sharers who were not parties to the agreement of sale u/s 12 of the Specific Relief Act ”.

7. The Apex Court has referred provision of Section 12 of the Specific Relief Act and when it is laid down that joint family property owned by other co-sharers also, the vendee is not entitled to obtain sale deed of undivided share of the vendor with right to force partition on the other co-sharers who were not parties to the agreement of sale in view of the provision of Section 12 of the Specific Relief Act. This proposition can not be disputed. Thus, the agreement itself is not enforceable as against the defendants and only on this count the Suit could not have been dismissed. The things would have been different if there was sale deed and in that case Suit could have been filed for partition against the defendants.

8. The point of readiness and willingness is also dealt with by the Courts below. In the agreement of sale [Exh.89], there is no mention that the execution of sale deed was not possible as the property was standing in the name of third party though there is mention that there was some technical difficulty. Time for execution of sale deed was fixed as one year. Admittedly, Geetabai and present defendants were owners of the property and due to mistake, the name of third party was mentioned in the revenue record. In view of these circumstances, it is not open to the plaintiff to say that the sale deed could not have been executed and the plaintiff was ready and willing to perform her part of the contract. This finding is on the finding of fact.

9. For giving decree of possession, the Courts below have observed that the defendants are owners, their counter claim is based on their title and as the possession of the plaintiff is unauthorized, the defendants are entitled to get decree of possession. Learned counsel for the plaintiff submitted that there was a lease document and so the decree of possession could not have been given. This submission is not acceptable. It was open space when the document was made and it was owned by 7 persons. One person could not

have given possession to the defendants. It appears that during pendency of the Suit, some record was created viz. record of payment of assessment by the plaintiff to show that the plaintiff is in possession and there is some construction over it. In the past, there was 7/12 extract showing the name of Vasant Shelke. The Courts below have held that the plaintiff is in possession, but there was no power with Geetabai to make the document of lease and so the possession as against the defendants is unauthorized. It was joint Hindu family property and in view of these circumstances, the Courts below have rightly held that the defendants are entitled to get possession. It is not the case of the plaintiff that she had become owner due to adverse possession and such stand was not taken as the Suit was filed for specific performance of contract and the plaintiff was claiming that it was the permissive possession.

10. In view of the aforesaid circumstances, it was not possible to grant the relief claimed by the plaintiff. The learned counsel for the plaintiff placed reliance on the case of this Court reported as 2011 (1) Bom.C.R. - 771 [Shriram Gangaram Gupta @ Jaiswal Vs. Veekay Builders Associates & Ors.]. The facts of the reported case were

totally different. There was discussion of provisions of Sections 10,12,16 (c) and 20 of the Specific Relief Act. In the present matter, there was no agreement of sale between the plaintiff and the defendants and so there was no question of using any discretion by the Court or even consideration of readiness and willingness against the present defendants. Thus, the observations made by this Court in the case cited by the learned counsel are of no use to the plaintiff.

11. Nothing can be achieved by admitting the Appeal and further no substantial question of law as such is involved. Position of law is settled as far as the aforesaid points are concerned.

12. In the result, Second Appeal stands dismissed. In view of disposal of Second Appeal, Civil application No. 8248 of 2015 does not survive and stands disposed of.

[T.V.NALAWADE, J.]