

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Second Appeal No.264 of 2016
[Mohammad Hanif Haji Sattar Vs. Prakash Dhirumal Jiwani]

**Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.**

Court's or Judge's orders

Mr. P. S. Tidke, Adv., for the appellant.
 Mr. Nitin Lalwani, Adv., for respondent no.1

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CORAM : A. S. CHANDURKAR, J.

DATE : 24th July, 2017

The appellant is the original defendant in the suit for specific performance filed by the respondent. It is the case of the respondent that on 3rd September, 2000, the appellant entered into an agreement to sell house property bearing no. 120. According to the respondent, the appellant was the owner of the suit property as his name was entered in the municipal records. The total consideration fixed was Rs.5,11,000-00, out of which Rs. 1,00,000-00 were paid as earnest amount. The plaintiff after issuing notice filed suit for specific performance.

According to the appellant, he had only half share in the suit property and the other half belonged to his brother. This fact was stated in the reply issued to the respondent's notice. The appellant was also ready to refund the earnest amount and, therefore, it was prayed that the suit be dismissed.

The trial Court after holding that the respondent was ready and willing to perform his part of the agreement decreed the suit to the extent of half undivided share of the appellant. The appellate Court confirmed said decree.

Shri Tidke, learned counsel for the appellant, submitted that the respondent despite being aware that the suit house was jointly owned sought specific performance of the entire property, when, admittedly his brother had half share therein. He submitted that no prayer for partition was made in the plaint and, in fact, a decree for refund of the earnest amount ought to have been passed. He referred to the provisions of Section 12 of the Specific Relief Act, 1963, and submitted that the respondent was not entitled for decree for specific performance.

Shri Lalwani, learned counsel for the respondent, supported the impugned judgment. According to him, it was not necessary to make a prayer for partition and separate possession and decree with regard to undivided share could always be passed. He referred to the deposition of the appellant to indicate that the agreement in question was duly admitted and, therefore, the suit had been rightly decreed to that extent. He referred to the decisions in **[1] P. C. Varghese Vs. Devaki Amma Balambika Devi &**

others [2006 (2) ALL MR (SC) 111], **[2] Surinder Singh Vs. Kappor Singh (dead) through L.Rs. & others** [2005 (1) ALL MR (SC) 816] and **[3] Gopal Ramvilas Gattani Vs. Sheshrao Pundlik Hivarkar (deceased) through LRs]** [2009 (1) ALL MR 142].

I have heard the learned counsel for the parties at length and perused the impugned judgments.

The agreement at Exh.20 relates to the entire house property. In the plaint, it was pleaded that the defendant was the owner of entire property as per the municipal records. The defendant in his cross-examination admitted that before entering into this agreement, he had consulted his brother, after which the agreement was signed. At that time, his brother had not objected to the same. It was only after the suit was filed that the appellant came up with the stand that the suit property was jointly owned. It has been found by both the Courts that the appellant had half share in the suit property and the respondent having proved his readiness and willingness to perform his part of the agreement, he was entitled for a decree with regard to the half portion.

In so far as absence of prayer for partition and separate possession is concerned, it has been rightly found by the first appellate Court that a decree for undivided share can be granted even in absence of

prayer for partition and separate possession. I find from the evidence on record that both the Courts have rightly exercised discretion in favour of the respondent. There is no perversity in the appreciation of evidence. The Second Appeal does not give rise to any substantial question of law. Same is, therefore, dismissed. No costs.

Judge

[hedau]