

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

**SECOND APPEAL NO.48 OF 2018 WITH
CIVIL APPLICATION NO.811 OF 2018**

Shaikh Abdul Ajaj s/o Haji Abdul Raheman ...APPELLANT

VERSUS

Sayyed Ahmed s/o Sayyed Gulab ...RESPONDENT

.....
Shri P.M. Gaikwad, Advocate for appellant
Shri Saeed S.Shaikh, Advocate for respondent
.....

CORAM: A.M. DHAVAL, J.

Date of reserving order : 1st November, 2018

Date of pronouncing order : 13th December, 2018

ORDER :

1. Heard learned Advocate Mr. P.M. Gaikwad for the appellant on admission of Second Appeal and learned Advocate Mr. S. S. Shaikh for the respondent.

2. The appellant is original plaintiff. His suit – Special Civil Suit No.6/2014 for specific performance, agreement to sell was allowed and the defendant was directed to execute sale deed in favour of the plaintiff on deposit of balance consideration of Rs.2 Lakhs by the plaintiff. In Regular Civil Appeal No.6/2017

preferred by the defendant, the decree for specific performance was set aside with alternative prayer for refund of earnest money with interest was granted.

3. The plaintiff/ appellant's claim is based on Isar Pavti dated 20.12.2010 (Exh.27) executed by the defendant. As per the agreement, land of 4 acres 38 gunthas at Block No.33, of Turkabad Hamlet, Taluka Gangapur was belonging to Tingote family. They agreed to sell the suit property to the defendant, but the defendant was not having sufficient funds for purchasing the property as well as for obtaining permission of Sub-Divisional Officer as the land was belonging to Mahar Hadola party. The defendant, therefore, obtained Rs.10 Lakhs from the plaintiff by two cheques and this fact was noted in the agreement. The boundaries of the suit plot are given and there was agreement that after the defendant would obtain permission, he would execute the sale deed in favour of the plaintiff. However, the consideration amount has not been written therein.

4. In the plaint and in the evidence, the appellant plaintiff claimed that the suit land was agreed to be sold for Rs.12 Lakhs, out of which part consideration of Rs.10 Lakhs was paid. The defendant obtained permission from Additional Collector on 27.11.2013 and thereafter, Tingote family executed the sale deed

in defendant's favour on 5.12.2013. But thereafter the defendant tried to execute sale deed in favour of a third party, who issued public notice, calling for objections and, therefore, the plaintiff filed the suit. With usual pleadings, the plaintiff claimed decree for specific performance or in the alternative, refund and earnest money with interest.

5. The defendant denied the execution of agreement. There was no delivery of possession. The members of Tingote family were not parties. The defendant has repaid Rs.3,50,000/- on 22.2.2012. The defendant was liable to pay Rs.1,50,000/- to the plaintiff and Rs.5 Lakhs to Ramizabegum from whom he had obtained hand loan. The learned Civil Judge, Senior Division accepted the case of the plaintiff and decreed the suit.

6. The first appellate Court observed that the agreement was not clear and unambiguous. There was no documentary evidence to show that the consideration agreed was Rs.12 Lakhs. Though the two attesting witnesses have supported the plaintiff, one of them is his mother and other is brother-in-law. The first appellate Court did not believe that such a huge amount would be paid without registered document. He relied on **Parakunnan Veetill Joseph's Son Mathew Vs. Nedumbara Kuruivila's Son and others, [AIR 1987 SC 2328]**. The value of the

property was not less than Rs.50 Lakhs and there was no proof of legally enforceable agreement. Hence, the decree for specific performance was refused.

7. Mr. P.M. Gaikwad, learned Advocate for the appellant relied on provisions of Section 92 (Proviso 2) and argued that, the plaintiff was entitled to lead oral evidence as to the consideration of the agreement and there was reliable evidence of the plaintiff supported by two witnesses on the consideration. The Trial Court had believed them and the appellate Court should not have disbelieved them without specific reasons. He argued that, the consideration shown in the sale deed executed by Tingote family in favour of the defendant was Rs.9 Lakhs only. Therefore the appeal be admitted.

8. Mr. Shaikh, learned Advocate for the respondent submitted that, there was no evidence to show a concluded contract between the parties. Hence, the first appellate Court has rightly refused to grant decree for specific performance and no interference is called for.

9. On carefully reading the Isar Pavti, it is apparent that, this cannot be treated as agreement to sell as the most material factors to prove existence of agreement to sell, namely

consideration amount is not disclosed. It shows the agreement to sell the land and part payment of Rs.10 Lakhs and also the description of the property. However, the agreement (Exh.27) cannot be treated as agreement to sell at all.

10. No doubt, a decree for specific performance can be granted even in case of oral agreement. In **V.R. Sudhakar Rao and others Vs. T.V. Kameswari [(2007) 6 SCC 650]**, there was oral agreement to sell with part payment of Rs.16,575/-. It was claimed that, the plaintiff had agreed to sell the suit land to the defendant @ Rs.65/- per square yard, but there were no such recitals. The Apex Court observed that the High Court held that the evidence was not very clear and the payment of advance amount of Rs.16,575/- was established. The Apex Court observed that, in case of oral agreement of sale, the doctrine of part performance under Section 53-A was not applicable and no protection can be given to the possession of the purchaser. It observed that, when there was no clear proof relating to essential terms of the agreement, decree for specific performance could not be granted.

11. In **K. Nanjappa (Dead) by L.Rs. Vs. R.A. Hameed Alias Ameersab (Dead) by L.Rs. [(2016) 1 SCC 762]**, it is observed :-

“21. There is no dispute that even a decree for specific performance can be granted on the basis of oral contract. an oral contract is valid.

22. However, in a case where the plaintiff comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus *ad idem* between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties.”

12. In **Aloka Bose Vs. Parmatma Devi and others [(2009) 2 SCC 582]**, it was held that agreement signed only by vendor and not purchaser was valid and enforceable.

13. After carefully considering the material on record and the documents advanced, I find that, the parties entered into a written document which though discloses intention of the

defendant/ respondent to sell the property and acceptance of consideration of Rs.10 Lakhs, it is silent with regard to consideration amount. No reasons are given why consideration was not shown. Thus, there was no concluded agreement showing the basic and fundamental terms of the agreement. In absence of such terms, proviso (2) to Section 92 could not be relied upon to lead evidence regarding consideration amount. Proviso (2) speaks about separate oral agreement as to any matter on which a document is silent. It contemplates that the agreement itself should be complete on basic fundamental terms and the separate oral agreement must be in respect of something besides the basic terms. Proviso (2) of Section 92 is clearly not applicable. Apart from this fact, the first appellate Court has given sound reasons as to why the evidence regarding the consideration amount was not reliable.

14. Learned Advocate Mr. Gaikwad relied on **Bai Hira Devi & ors. Vs. The Official Assignee of Bombay [(1958) AIR (SC) 448]**. It is observed,

“The best evidence about the contents of a document is the document itself and it is the production of the document that is required by Section 91 in proof of its contents. In a sense, the rule enunciated by Section 91 can be said to

be an exclusive rule inasmuch as it excludes the admission of oral evidence for excludes the admission of oral evidence for providing the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act.”

15. The reliance is also placed on **P. Panneerselvan Vs. A. Baylis S/o V. Anbumani [2005 (5) CTC 17]**. In this case, the agreement did not indicate specification of particular property to be sold. It was offer of defendant to convey lands worth Rs.1 Lakh and rate of land had to be agreed upon later. It was held that, there was no concluded contract.

16. In **Marahul Enterprises and others Vs. Mrs. Vijaya Sirivastava and Mr. R.R. Sood etc. etc., [(2003) AIR (Delhi) 15]**, the price was agreed to be settled on completion of the flat. It was held that, when contract was not concluded, no decree for specific relief can be granted.

17. In **Kallathil Sreedharan and another Vs. Komath Pandyala Prasanna and another [(1996) 6 SCC 218]**, it was found that the plaintiff admitted that he was not keen to purchase the property, but since it was offer, he entered into agreement. It was held that, the High Court rightly exercised the discretion in not granting specific performance.

18. In **Ganesh Shet Vs. Dr. C.S.G.K. Setty [AIR 1998 SC 2216]**, the land belonged to three brothers jointly. One of the brothers told the purchaser that he had not yet consulted his two brothers for sale consideration. The sale consideration was not finalised. It was held that, there was no concluded contract between the parties on which decree for specific performance could be passed. It was observed that, in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain.

19. In the light of these facts, I find that the learned first appellate Court has not committed any mistake. The settled legal position was not followed by the trial Court and the same is corrected by the first appellate Court. Hence, no substantial question of law is involved. Hence, the appeal deserves to be dismissed in limine. Hence, the Second Appeal is dismissed in limine. No order as to costs.

20. In view of dismissal of the Second Appeal, Civil Application No.811/2018 stands disposed of.

**(A.M. DHAVALÉ)
JUDGE**

fmp/