

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.289 OF 1994

Kerba s/o ambadas Dhengle,
Age 62 years, Occupation Agril.,
R/o Jawalgaon Tq. Barshi
Dist. Solapur.

...Appellant.

VERSUS

Digambar s/o Ishwara Chavan,
Age 62 years, Occupation Agril.,
R/o Jawalgaon Tq. Barshi
Dist. Solapur.

(Deceased Through His L.Rs.)

- A. Chandrakant s/o Digambar Chavan,
Age 55 years, Occupation Agri.,
R/o Deogaon Tq. Mohol
Dist. Solapur.
- B. Madhukar s/o Digambar Chavan,
Age 50 years, Occupation Agri.,
R/o Jawalgaon (Jotibachi Wadi)
Tq. Barshi Dist. Solapur.
- C. Netaji s/o Digambar Chavan,
Age 35 years, Occupation Agri.,
R/o Jawalgaon (Jotibachi Wadi)
Tq. Barshi Dist. Solapur.
- D. Shrihari s/o Digambar Chavan,
Age 40 years, Occupation Agri.,
R/o Jawalgaon (Jotibachi Wadi)
Tq. Barshi Dist. Solapur.
- E. Rukmini w/o Dadasaheb Yadav,
Age 52 years, Occupation Household,
R/o Nandani Tq. Barshi Dist.Solapur.
- F. Chaya w/o Babruwan Yadav,

Age 38 years, Occupation Household,
R/o Nandani Tq. Barshi Dist.Solapur.

- G. Shobha w/o Anant Dhere,
Age 35 years, Occupation Household,
R/o Near Old Pune Naka, Vasantnagar
Tq. Uttar Solapur Dist.Solapur.

...Respondents.

....
Mr. K. K. Kulkarni, Advocate for Appellant.
Mr. S. S. Choudhary, Advocate for Respds. No.A to G.

....
CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Judgment :
12-04-2019.**

**Date of Pronouncing The Judgment :
06-06-2019.**

JUDGMENT :

1. Present appeal has been filed by the original plaintiff challenging the Judgment and decree passed by learned II Additional District Judge, Osmanabad in Regular Civil Appeal No.51 of 1985 on 04-02-1994 whereby the appeal filed by the present respondent came to be allowed and the Judgment and decree passed by the Trial Court was set aside.

2. The present appellant had filed Regular Civil Suit No.77 of 1979 for specific performance of the contract against the present respondent before learned Civil Judge, Junior Division, Tuljapur Dist. Osmanabad. Present respondent – original defendant is the owner of agricultural land bearing Survey No.55 admeasuring 5 Acres 12 Gunthas situated at village Kati Tq. Tuljapur Dist. Osmanabad.

Specific boundary of the suit property has been described. It is stated that, it is a self acquired property of the defendant. Defendant had agreed to sell the said land on 18-05-1977 for a consideration of Rs.3000/- to the plaintiff. On the same day defendant had received amount of Rs.2000/- as earnest amount. The agreement to sell was a registered document. It was agreed that the defendant would deliver the possession of the suit land on the same day. Plaintiff was ready and willing to perform his part of the contract, pay balance of amount of Rs.1000/- and get the sale deed executed in his favour. However, defendant avoided to do so. Plaintiff specifically asked defendant to execute the sale deed on 29-04-1979, however defendant refused, and therefore suit was filed for specific performance of the contract. Alternatively it was also stated that, if it was found that plaintiff is not in possession of the property then he be put in possession in pursuant to the specific performance. Further alternatively another prayer was made that, if the relief of specific performance cannot be granted to him then earnest amount be refunded to him.

3. Defendant resisted the claim of the plaintiff by filing written statement. It is denied that, there was any agreement to sell executed by him on 18-05-1977; thereby agreeing to sell 5 Acres 12 Gunthas land for a consideration of Rs.3000/- and acceptance of Rs.2000/- as earnest amount. It is denied that, he had handed over

possession of the suit property to the plaintiff on 18-05-1977. It is stated that, the cause of action shown in the plaint is imaginary. It is stated that, plaintiff is doing illegal business of money lending. Defendant was in need of amount of Rs.1000/- and after acceptance of the said amount, he has executed deposit receipt i. e. "Thev Chithi" on 11-07-1975 stating that he would give double amount inclusive of interest @ of 25 % per annum. It is stated that, the defendant could not have got the money if he would not have executed that document. The said document is executed merely as a security with understanding not to act upon. It is stated that the said amount is repaid. A notice was issued by the plaintiff to the defendant on 08-01-1980 through advocate and then he had demanded the said amount of Rs.2000/-. Defendant has replied the said notice. It is stated that, plaintiff intends to claim two amounts i.e. under deposit receipt dated 11-07-1975 and secondly under agreement to sell dated 18-05-1977, which can not be allowed. On these grounds he prayed for dismissal of the suit.

4. Taking into consideration the rival contentions issues came to be framed. Parties have led oral as well as documentary evidence. After taking into consideration the evidence as well as hearing both sides, the learned Trial Court has decreed the suit for specific performance of the contract. Plaintiff was directed to deposit the remaining amount of consideration of Rs.1000/- and then the

defendant was directed to execute the sale deed within one month from the date of depositing of the money by the plaintiff. Thereby the said suit came to be decreed on 20-11-1984.

5. The said decree, as aforesaid, was challenged by the original defendant in Regular Civil Appeal No.51 of 1985 and after hearing both sides, the said appeal came to be allowed. The Judgment and decree passed by the learned Trial Court was set aside and the suit was totally dismissed. Hence, this second appeal by original plaintiff.

6. Heard learned advocate Mr. K. K. Kulkarni for appellant and learned advocate Mr. S. S. Choudhary for respondents No.1A to 1G. It has been vehemently submitted that the property which was agreed to be sold was self acquired property of the defendant. Registered agreement to sell was executed on 18-05-1977. The consideration was fixed as per the discussion between the two parties at Rs.3000/-, and earnest amount of Rs.2000/- was given. Since the amount of Rs.3000/- was of much value, when the agreement was executed in 1977, it cannot be stated that it was in any way inadequate consideration. Plaintiff was always ready and willing to perform his part of the contract and the sale deed was to be executed within two years. When no steps were taken by the defendant, plaintiff had called upon him to execute the sale deed on

29-04-1979 and when it was found that the defendant has refused the request, the suit came to be instituted on 04-05-1979. If we peruse the written statement, then, it can be seen that, there is only denial. The defence that has been taken is of loan transaction of Rs.1000/-. The learned Trial Court has rightly appreciated the evidence. Independent attesting witness examined, supports the claim of the plaintiff about agreement to sell whereas; the defendant apart from examining himself has examined another witness who is his relative. He was bound to support the defence of the defendant. However, the plaintiff has proved the execution as well as payment of earnest amount. It was not necessary for the plaintiff to issue any notice prior to the suit to show his readiness and willingness. When defendant had come with a case that, the real transaction behind the execution of the document is different, thereby he is admitting the execution, there is specific bar against him under Section 91 and 92 of the Indian Evidence Act to lead any such evidence beyond the contents of the document executed by himself. Even if for the sake of arguments it is accepted that, in order to prove that the real nature of the transaction was different and for that purpose evidence could have been adduced by the defendant, the evidence adduced by the defendant is not sufficient to infer that the parties had any different intention. Defendant has failed to prove that, it was a loan transaction. No evidence was adduced by

the defendant to prove that, plaintiff is doing money lending business illegally and that the transaction in question was a money lending transaction. This fact is, in fact, noted by the learned First Appellate Court in its Judgment also. But then the learned First Appellate Court went wrong in reversing the decree only on the ground that the consideration amount that was fixed is very much on the lower side. Further it appears that, there was confusion in the mind of the Court regarding the transaction of loan amount of Rs.2000/- by the plaintiff to defendant. In fact that was earlier transaction and when defendant had failed to pay that amount also, suitable legal action has been taken by the plaintiff against the defendant in Barshi Court. There is absolutely no denial to the contention made by the plaintiff that he was always ready and willing to perform his part of the contract. Therefore, the learned First Appellate Court erred in reversing the decree only on the ground of inadequacy of the consideration. Since the substantial questions of law are arising they deserve to be answered in favour of the appellant.

7. Appellant – original plaintiff has relied on the following citations ;

i) *K. Prakash Versus B.R. Sampath Kumar*, reported in AIR 2015 Supreme Court 9,

ii) *Nilkanth Dhondiba Chgavan (D) by L.Rs. Versus Sou. Umabai and Another*, reported in AIR 2005 Bombay

98,

iii) *Parminder Singh Versus Gurpreet Singh*, reported in AIR 2017 Supreme Court 3601,

iv) *P. Lakshmi Ammal Versus S. Lakshmi Ammal and others*, reported in AIR 1991 Madras 137,

v) *Syed Dastagir Versus T. R. Gopalakrishna Setty*, reported in AIR 1999 Supreme Court 3029,

vi) *Himatlal Purshottam Shah Versus Supadu Pavanu Hadge and others*, reported in 1987 (3) Bom.C.R. 330,

8. Per contra, the learned advocate for the respondent submitted that, plaintiff has agreed that defendant has executed a "Thev Chitthi" on 11-07-1975 for consideration of Rs.2000/-. There is no evidence as to whether that amount was paid or not but for that purpose the plaintiff has already taken legal action against defendant by filing a suit for recovery of amount in Barshi Court. In agreement to sell dated 18-05-1977 also, there is a mention of Rs.2000/- by way of "Thev Chitthi". That means, as regards consideration is concerned, there is no consistent stand taken and the plaintiff has failed to prove that, those transactions are separate and distinct. Plaintiff himself had issued notice dated 08-01-1980 for recovery of amount of Rs.2000/- but then what was executed on 18-05-1977 was "बीना ताब्याची जमीनीचे इसार पावती ". That means, possession was not handed over to the plaintiff on the day of execution of that document. It was tried to be contended that a separate agreement for handing over of possession was executed,

but that document was never placed on record. Therefore, both the Courts have rightly held that the defendant possesses the suit property. When the plaintiff has led contrary evidence regarding the said aspect, case of the plaintiff cannot be believed. The reasons given by the learned First Appellate Court for reversing the decree passed by the learned Trial Court are proper and legal. The discretion was not properly used by the learned Trial Court as contemplated under Section 20 of the Specific Relief Act. On the contrary the said discretion has been properly considered by the learned First Appellate Court. Merely because the specific performance of the contract is prayed, it is not necessary that it should be granted. But when there are so many lacunas left by the plaintiff in pleading as well as evidence then the First Appellate Court was justified in reversing the finding and reappreciating the evidence at the time of passing the Judgment.

9. At the outset, when the appeal was admitted by this Court on 18-10-1994 it was stated that, interpretation of Exhibit 31 is substantial question of law. Exhibit 31 is the agreement to sell dated 18-05-1977. The said question of law is not framed in the form of question. It is not necessary to re-frame the substantial question of law, now. It is taken as it is. In this substantial question of law itself it can be stated that, apart from interpreting Ex.31, as to whether it is a agreement to sell or money lending transaction, the further

points those are covered are readiness and willingness of the plaintiff to perform his part of the contract, and whether plaintiff is entitled to get specific performance of the contract. Therefore on this line the matter proceeds.

10. The plaintiff has examined himself and P.W.2 Harischandra Dhengale who was the attesting witness to the said document. Defendant has also examined himself and D.W.2 Maruti Chavan who is stated to be present at the time of settlement of talks. If we consider the written statement filed by the defendant, then it can be seen that he is not denying the execution of the document. He is admitting his signature. It can also be apparent from his as well as evidence of D.W.2 Maruti. When the execution of the document is not disputed, then the burden was on the defendant to prove that the real nature of the transaction between him and the plaintiff was different than what is written in the document itself. No doubt as regards contents are concerned, normally the defendant would not have been permitted to lead any evidence contrary to the contents of the document in view of bar under Section 92 of the Indian Evidence Act. However when he has come with a case that real nature of the transaction itself was different then he could have led the evidence to support his contention. Accordingly he has led the evidence and now it is required to be seen as to whether that evidence can be said to be trustworthy, acceptable or not. When

plaintiff has come with a case that, on the day of the agreement to sell he has paid amount of Rs.2000/- and then it was agreed that the sale deed would be executed within two years thereafter. In his cross-examination it has been brought on record that, in fact he had paid that amount of Rs.2000/- about six months prior to the execution of the agreement to sell. It appears that, this answer by the plaintiff has been considered by the First Appellate Court and then it was held that it is a loan transaction as the said fact is contrary to what has been stated in agreement to sell Exhibit 31. However, what the learned First Appellate Court did not consider is that, that in his cross-examination, the plaintiff has admitted that prior to the present transaction he had given amount of Rs.2000/- to the defendant, when there was marriage of son of defendant in 1975. At that time he had got executed deposit receipt from defendant on a stamp paper of Rs.5/- and in that respect when defendant failed to repay the amount, the plaintiff had issued notice in the year 1980 and then his suit for recovery of that amount was pending on the date of his cross before Barshi Court. It appears that, the said amount of Rs.2000/- which was tried to be mingled with the present transaction and even if we take the said admission as simple admission, yet the said amount which was given by him six months prior to the execution of the agreement was treated as earnest amount on the date of the agreement from the contents of

the agreement Exhibit 31 ought to have been considered by the learned First Appellate Court. If we consider the case of the defendant at this stage itself then according to him the loan transaction had taken place in 1975 then what was the reason for him to execute agreement to sell on 18-05-1977; almost 1 ½ to 2 years thereafter, is a question and we do not find any proper answer to the same in the written statement as well as in the evidence of the defendant. According to him he had taken loan of Rs.1000/- only and then executed "Thev Chitthi" on 11-07-1975 for double amount inclusive of interest @ of 25 % per annum. According to him he had repaid the said amount vide deed of "Sathekhat" i.e. Exhibit 31. In fact this fact itself is indigestible that, when he was repaying the loan then the plaintiff should give him in writing thereby acknowledging the receipt, but then how can defendant would execute agreement to sell on 18-05-1977 is a question. It will not be out of place to mention here that, the defendant is not coming with a case that he was not able to understand what is written in Exhibit 31. That means, with full knowledge about what are the contents of the document, he has signed that document. Another fact that is also then required to be considered is that, as per his contention the loan was repaid on 18-05-1977. There was no question of giving anything in writing by him. Still, when he is executing something, he had every kind of knowledge about the

same, but then he did not file any suit or any such step was not taken by him to have the effect that document cancelled. If we consider the testimony of D.W.2 Maruti then it can be seen from his cross that, the oral agreement regarding sell of suit land took place in the morning in presence of police patil Harischandra Dhengale but then he was unable to remember the date of oral agreement. If we consider this aspect then it can be seen that even the witness had no knowledge about the nature of the document which defendant was executing on that day. When loan transaction did not exist, defendant was not justified in coming with a defence stating that whatever was done while executing agreement Exhibit 31, was a money lending transaction.

11. Between the attesting witness P.W.2 Harishchandra Dhengale and D.W.2 Maruti Chavan definitely the testimony of P.W.2 Harishchandra appears to be probable because according to him there was talk between plaintiff and defendant about the transaction at Javalgaon in his presence which was regarding agreement to sell which took place two days prior to execution of agreement to sell. He is definitely disclosing the presence of D.W.2 Maruti at the time of transaction. No doubt there are minor discrepancies as to when exactly the amount was paid and what is written in the document but certainly that discrepancy was not going to the root of the matter and negativating its effect. Under such

circumstance when we consider the evidence adduced by both the parties, it appears that the evidence led by the plaintiff is more probable.

12. The First Appellate Court has placed much reliance on the fact that in the title of Exhibit 31 it is stated that, it is an "agreement to sell of land without possession". Then the plaintiff had come with a case that, there was separate document regarding handing over of the possession. Defendant has denied that, he had parted with the possession of the property with the plaintiff. Even if we take that, possession was not handed over to the plaintiff yet merely when plaintiff is saying that there was a separate agreement then he could not prove that the possession was handed over to him, that does not mean that Exhibit 31 itself is false or there was some different intention in respect of execution of that document.

13. As aforesaid the defendant had come with a case that, it was a loan transaction and he repaid the loan amount on 18-05-1977. If we consider the testimony of D.W.2 Maruti, it can be seen that he has stated about the loan transaction between plaintiff and defendant in 1975, but then as regards Exhibit 31 he says that, plaintiff got executed the agreement to sell as security for amount of Rs.2000/- due from the defendant. Defendant did not receive amount of Rs.2000/- as mentioned in the agreement to sell. He is

also not explaining as to why for a loan transaction of 1975 apart from as stated by him document was already got executed by the plaintiff as "Thev Pavti", why it was necessary for the plaintiff to get some more document by way of security. D.W.2 Maruti has not at all in categorical terms stated that, defendant had repaid the amount of Rs.2,000/- on 18-05-1977 to plaintiff. Therefore, from any angle it can be seen that, defendant had failed to prove that it was a money lending transaction. He has not led any evidence to prove that plaintiff is doing illegal money lending business in the village.

14. The second point that requires consideration is the readiness and willingness of the plaintiff to perform his part of the contract. It is to be noted that, out of the said consideration amount which was agreed by both the parties, the plaintiff had paid substantial part. The remaining was to be paid at the time of sale deed. It was not necessary for the plaintiff to produce evidence to show that, he had that much amount with him when the matter proceeded before Trial Court. Further it was also not necessary for the plaintiff to issue notice in writing calling upon the defendant to execute the sale deed. He has come with a consistent theory that, he had issued notice in respect of the loan transaction which was a different transaction, for which he had already taken action before Barshi Court. Now as regards this transaction, the averment about readiness and willingness and proof thereof by way of oral evidence was sufficient

compliance to hold him ready and willing to perform his part of the contract. In *P. Lakshmi Ammal (Supra)*, wherein it was held that,

“As regards readiness and willingness of the purchaser it which was neither specifically denied in written statement nor deposed by the defendant then it should be held that the purchaser is ready and willing to perform his part of the contract.”

This ratio is applicable here. So also the similar ratio laid down in, *Himatlal Purshottam Shah Versus Supadu Pavanu Hadge and Others*, reported in 1987 (3) Bom.C.R.330, *Syed Dastagir Versus T.R.Gopalakrishna Setty*, reported in AIR 1999 Supreme Court 3029, *Nilkanth Dhondiba Chavan (D) by L.Rs. Versus Sou. Umabai and another*, reported in AIR 2005, Bombay 98, are applicable here.

15. It is to be noted that, the learned First Appellate Court has refused to grant the discretionary relief on the ground of inadequacy of consideration also. In fact he had come to the conclusion that, plaintiff has failed to prove that, defendant had agreed to sell the suit land. That means, he considered that plaintiff has failed to prove agreement Exhibit 31. Then the other points for consideration, that is points No.2, 3 and 4 in the Judgment of the learned First Appellate Court had in fact 'did not survive'; but still it appears that, there is discussion regarding the same. As regards inadequacy of price what is observed is that 'there is no contention raised by the defendant in respect of inadequacy of price'; but, then it is stated

that a Judge should not ignore this aspect. The first and the foremost fact is that, when that point did not fall for consideration, he was considering it alternatively and while taking into consideration the said fact, the set principles ought to have been considered first. In the written statement of the defendant there is absolutely no whisper about inadequacy of consideration. Further in *Gobind Ram Versus Gian Chand*, reported in (2000) 7 Supreme Court Cases 548, it has been held that,

“The inadequacy of consideration or the fact that the contract is onerous to the defendant is not sufficient to deny the relief of specific performance.”

Further perusal of Section 20 of the Specific Relief Act, Explanation-I would make it clear that,

“Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). ”

16. What we cannot ignore is the fact that, the date of agreement is 18-05-1977 and at that time the amount of Rs.3000/- was a considerable one. Merely because the First Appellate Court was considering that dispute in the year 1994, we cannot take then prevailing rates into consideration to hold that what was fixed was inadequate. Evidence has not been led by the defendant to show

that, the price of 5 Acres 12 Gunthas land was not equivalent to Rs.3000/- in 1977.

17. Now in this case, the First Appellate Court though justified in reappreciating the evidence which is permissible under Section 96 read with Order 41 of the Code of Civil Procedure, yet on the basis of evidence that was adduced and when the fact which ought to have been considered as to whether after about two years when the defendant was executing the document, was justified in linking that loan transaction which had taken place two years prior to Exhibit 31, was the basic question which was not considered by the learned First Appellate Court. The Trial Court has considered and appreciated the evidence properly, and therefore, the substantial question of law as framed by this Court while admitting the matter on 18-10-1994 deserves to be answer as "Exhibit 31 is an agreement to sell executed by defendant in favour of plaintiff. Plaintiff has proved that, he is ready and willing to perform his part of the contract".

18. Now the question would arise as to whether the discretion that is required to be exercised under Section 20 of the Specific Relief was exercised properly by the Trial Court or not. Here it is to be noted that, the First Appellate Court has totally negated the claim of the plaintiff by holding that the nature of the transaction itself was different, and therefore, exercise of powers under Section 20 of the

Specific Relief Act by the First Appellate Court did not arise. As has been laid down in, *K. Prakash Versus B.R. Sampath Kumar*, reported in AIR 2015 Supreme Court 9 (*Supra*) that,

“The Court's Jurisdiction to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with the sound and reasonable judicial principles.”

Further observations are more important,

“Normally, when the trial court exercises its discretion in one way or other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under S.20 that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree is established then the Court has to exercise its discretion in favour of granting relief for specific performance.”

Almost similar view was taken in *Parminder Singh Versus Gurpreet Singh*, reported in AIR 2017 Supreme Court 3601 (*Supra*). Thus the learned Trial Court had exercised its discretion under Section 20 of

the Specific Relief Act properly, and therefore decreed the suit. The learned First Appellate Court was not justified in allowing the appeal and setting aside the decree by the learned Trial Court. Under such circumstance, the appeal deserves to be allowed. Hence, following order.

ORDER

- 1) The second appeal is hereby allowed.
- 2) The Judgment and decree passed by the II Additional District Judge, Osmanabad in Regular Civil Appeal No.51 of 1985 dated 04-02-1994 is hereby set aside.
- 3) The Judgment and decree passed by learned Trial Court i.e. Civil Judge, Junior Division, Tuljapur Dist. Osmanabad in Regular Civil Suit No.77 of 1979 dated 20-11-1984 is hereby restored.
- 4) Taking into consideration the above said facts, parties to bear their own costs.
- 5) Decree be drawn accordingly.

**(SMT. VIBHA KANKANWADI)
JUDGE**

vjg/-.