

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

FIRST APPEAL NO. 3565 OF 2017

1. Mrudalaben w/o Manoharlal Babaria
Age : 72 yrs, occu.: business.
2. Deepak Manoharlal Babaria
Age : 52 yrs, occu.: business
3. Nilesh Manoharlal Babaria
Age : 51 yrs, occu.: business

All r/o Arihant, Block No.5,
Laxman Chowdi, Mondha Road,
Beside Hotel Starling Inn,
Aurangabad.

Appellants.

Versus

1. M/s Chhallani Ginning and Pressing Factory,
A Registered Partnership Firm,
Through its Partner,
Jainendra Inderchand Chhallani,
Age : 53 yrs, occu.: business
R/o Plot No.29, N-3, CIDCO,
Aurangabad.
2. Yogesh Vishwanath Jadhav
Age : 40 yrs, occu.: business
R/o 10, Shriniketan Colony,
Jalna Road, Aurangabad.
3. Santosh Bhivsanrao Wagh
Age : 43 yrs, occu.: business
Proprietor Dwarka Associates,
R/o Sanjay Smruti, Maqbara Road,
Begumpura, Aurangabad.

4. Ramesh Yadavrao Patil
Age : 50 yrs, occu.: business
R/o Sahjivan Society, Shalal
Road, Udgir, Taluka Udgir,
District Latur.

Respondents.

Mr. P.M. Shah, Senior Counsel on behalf of
Mr. B.R. Warma, Advocates for the appellants.
Mr. P.F. Patni, Advocate for respondent No.1.

**CORAM : T.V. NALAWADE AND
SUNIL K.KOTWAL, JJ.**

Dated : 3rd January 2019.

JUDGMENT (Per Sunil K. Kotwal).

1. This appeal is directed against judgment and decree passed by Civil Judge, Senior Division, Aurangabad in Special Civil Suit No.26/2014. The appellants are original defendant Nos.4 to 6. Respondent No.1 is the plaintiff and respondent Nos.2, 3 and 4 are original defendant Nos.1 to 3 respectively.

2. Hereinafter the parties are referred in accordance with their status in original proceeding.

3. Shorn off unnecessary details, the facts leading to institution of this appeal are that the plaintiff filed suit for specific performance of contract for sale dated 18.01.2011, alleged to be executed by defendant No.1 in favour of plaintiff in respect

of plot No.49 (CTS No.13158/6) admeasuring 344.5 sq. metres. with two storied building standing thereon, described in para-1 of the plaint (hereinafter referred to as "suit property") and in the alternate for refund of earnest money with interest at the rate of 24% per annum from the date of agreement.

4. Plaintiff is a registered Firm. Defendant No.1 is the owner of suit property situated at Aurangabad. Plaintiff and defendant No.1 had cordial relations with each other. Therefore, after negotiations, on 18.01.2011, by executing written agreement of sale, defendant No.1 agreed to sell the suit property to the plaintiff for total consideration of Rs. 2,11,00,000/- (Rupees Two Crore Eleven Lakh), after receiving earnest amount of Rupees Two Crore under RTGS Cheque No.421714 dated 13.01.2011, which was credited in the account of Yog Industries, for which the brother of defendant No.1 namely Narendra Jadhav was acting as Managing Director. The balance consideration of Rs. 11,00,000/- (Rupees Eleven Lakh) was payable to defendant No.1 within the period of three months from the date of execution of agreement, at the time of execution of registered sale deed by defendant No.1 in favour of plaintiff, subject to compliance of

required documentation by defendant No.1. However, defendant No.1 did not keep his word and did not execute registered sale deed of the suit property within prescribed time limit after compliance of necessary documentation, though the plaintiff was all along ready and willing to perform its part of contract. Therefore, the plaintiff served notice to defendant No.1 on 27/28 December 2013 and demanded execution of registered sale deed after receiving the balance consideration of Rs. 11,00,000/-. However, defendant No.1 did not pay any heed to that notice. Subsequently the plaintiff came to know that defendant No.1 played fraud and executed registered Development Agreement dated 25.04.2012 in favour of defendant No.2 and defendant No.1 also executed registered sale deed of the suit property in favour of defendant No.3 on 04.08.2011, for meager consideration. Therefore, the plaintiff was constrained to file suit for specific performance of contract against the defendants. Subsequently the plaintiff learnt that defendant Nos. 4 to 6 purchased the suit property from defendant No.3 at throw-away price, without making necessary inquiry and verifying concerned record. Therefore, they were also joined as defendant Nos.4 to 6 in the suit on 30.08.2016.

5. Contention of the plaintiff is that the suit property is in possession of defendant No.1, though in the agreement of sale it is mentioned that the possession was delivered to the plaintiff on the date of execution of agreement. Accordingly, plaintiff prayed for decree of specific performance of contract of sale and for possession of suit property. In the alternate plaintiff claimed for refund of earnest amount with interest at the rate of 24% per annum from the date of agreement.

6. Defendant No.1 countered the suit claim by filing written statement (Exh.39), by contending that his brother namely Narendra Jadhav was carrying out business in the style “Yog Industries” and at that relevant time he was in need of certain investment. Therefore, he authorised defendant No.1 to collect the required funds for Yog Industries. In response to the proposal given by defendant No.1 to the plaintiff, the plaintiff invested an amount of Rupees Two Crore in the business of Yog Industries and as a collateral security for that investment, defendant No.1 executed the impugned agreement of sale of the suit property in favour of plaintiff. Subsequently defendant No.1 repaid the amount of Rs. 1,20,00,000/- (One Crore Twenty Lakh)

to the plaintiff. Regarding Development Agreement executed in favour of defendant No.2, contention of defendant No.1 is that the said contract was cancelled as 'not enforceable'. Regarding execution of registered sale deed of the suit property in favour of defendant No.3, it is contended by defendant No.1 that it was also transaction of investment by defendant No.3 in Yog Industries and registered sale deed was part of collateral security for the invested amount by defendant No.3.

7. By filing written statement (Exh.58) defendant Nos.4 to 6 resisted the suit claim and adopted the same defence as raised by defendant No.1. The main contention of defendant Nos.4 to 6 is that they are bonafide purchasers of the suit property as they purchased it after due inquiry and publication of proclamation in newspaper. The next contention of defendant Nos.4 to 6 is that after purchase of suit property on 19.04.2007, defendant No.1 borrowed loan of Rs. 40,00,000/- from Ajinta Urban Co-operative Bank and mortgaged the suit property with the Bank. This fact was not disclosed by defendant No.1 to defendant No.3 when it was sold on 04.08.2011. Subsequently for recovery of outstanding loan the Bank put the suit property for

sale in auction and published auction notice in newspaper on 21.03.2013. Thereafter defendant No.3 filed securitization application No.52/2013 before Debt Recovery Tribunal, Aurangabad. In that proceeding the matter was settled in between the Bank, defendant No.1 and defendant No.3. As per the terms of settlement, defendant No.3 paid outstanding loan of Rs. 33,00,000/- on behalf of defendant No.1 and release deed was executed by the Bank in favour of defendant No.3. Defendant No.3 was in possession of the suit property since the date of purchase and after sale of suit property by defendant No.3 to defendant Nos.4 to 6 on 13.01.2014 for the consideration of Rs. 43,00,000/-, defendant Nos.4 to 6 obtained its possession as a open plot and the same is recorded in the name of defendant Nos.4 to 6 as owners. Accordingly, defendant Nos.4 to 6 prayed for dismissal of the suit.

8. Defendant Nos.2 and 3, though served with suit summons, remained absent. Therefore, suit proceeded exparte against them.

9. On above pleadings of parties, the trial Court framed issues at Exh.41. After considering the evidence placed on record

by both parties, the trial Court held that defendant Nos.4 to 6 are not bonafide purchasers. The trial Court accepted the case of plaintiff and passed decree for specific performance of contract of sale and for possession of suit property. Therefore, this appeal arises.

10. Heard Mr. P.M. Shah, learned Senior Counsel for the appellants and Mr. P.F. Patni, learned Counsel for respondent No.1 (plaintiff).

11. Learned Senior Counsel for the appellants assailed the judgment passed by the trial Court on the ground that the impugned agreement of sale (Exh.22) is un-registered document, though its recitals indicate that possession of the suit property was delivered to the plaintiff. He submits that under Article 25 of the Maharashtra Stamp Act heavy stamp duty is payable. However, the trial Court without impounding the document and without recovery of stamp duty and penalty, erroneously exhibited and admitted the agreement of sale, though it is inadmissible under Section 34 of the Maharashtra Stamp Act. He submits that the trial Court erroneously exhibited this document only on the ground that parties have admitted that

despite the recitals in the agreement regarding delivery of possession to the plaintiff the suit property was not in possession of plaintiff on the date of filing of suit. He submits that it is the recitals contained in the document that are conclusive of its admissibility in evidence. He submits that as the recitals of agreement show delivery of possession of the suit property to the plaintiff, it is to be treated as 'conveyance' under Article 25 of Maharashtra Stamp Act, and therefore, being insufficiently stamped document, it is inadmissible in evidence. To substantiate this contention, he placed reliance on the judgment in the case of **“Omprakash VS. Laxminarayan and others”** [(2014) 1 SCC 618].

12. Th next submission of the learned Senior Counsel for the appellants is that, from the cross-examination of plaintiff it becomes clear that before entering into the agreement of sale with defendant No.1, the plaintiff neither made necessary inquiry about clear title of defendant No.1 nor he issued public notice calling upon the objections of third persons. Despite knowledge of Debt Recovery Tribunal proceedings in between defendant No.3, Bank and defendant No.1, the plaintiff did not

take any action. Thus, over all conduct of the plaintiff shows that he is a negligent person in whose favour discretionary relief cannot be granted.

13. The next submission of the learned Senior Counsel for the appellants is that, even the entries in the account maintained by plaintiff Firm do not show that Rupees Two Crore were advanced to defendant No.1 as earnest amount for purchase of suit property. He has also pointed out that for certain period the plaintiff acted as Authorised Signatory for Yog Industries. This indicates that plaintiff paid amount of Rupees Two Crore to Yog Industries only as investment which is also subsequently recovered by plaintiff when he was Authorised Signatory. The learned Senior Counsel prays for dismissal of the suit.

14. Learned Counsel for respondent No.1 (plaintiff) submits that being subsequent purchaser from defendant No.3, the defendant Nos.4 to 6 can take only the defence of bonafide purchaser for valuable consideration without notice of the transaction in between plaintiff and defendant No.1. He has drawn our attention to Section 19 (b) of the Specific Relief Act. He submits that even in written statement a vague defence of

bonafide purchaser is taken by defendant Nos.4 to 6.

15. The next contention of learned Counsel for respondent No.1 is that though defendant No.3 purchased the suit property from defendant No.1 for more than Rs. 73,00,000/-, he sold out the said property to defendant Nos.4 to 6 for lessor consideration of Rs. 43,00,000/-. This indicates that defendant Nos.4 to 6 are not bonafide purchases for valuable consideration.

16. The next contention of learned Counsel for respondent No.1 is that, at the time of agreement of sale, inquiry regarding clear title of defendant No.1 is not necessary as the said inquiry can be made before execution of registered sale deed. He has pointed out that even in the agreement (Exh.22) it is specifically mentioned that the suit property was free from every encumbrances. He has also pointed out that in the cross-examination defendant No.1 has admitted that he had informed defendant No.3 in respect of his agreement of sale with the plaintiff. The learned Counsel submits that as defendant No.3 is not bonafide purchaser without notice for valuable consideration, the defence under Section 19 (b) of Specific Relief Act is not available to defendant Nos.4 to 6 who are subsequent purchasers

of suit property from defendant No.3.

17. Regarding the objection raised by learned Senior Counsel for the appellants about admissibility of agreement of sale (Exh.22) on the ground of insufficient stamp duty and un-registered agreement, the learned Counsel for respondent No.1 has drawn our attention to Section 35 of Maharashtra Stamp Act and submits that as at the time of admitting this agreement of sale in evidence the objection was not raised by any defendant, at this subsequent stage they cannot take objection about the admissibility of this document except availing remedy under Section 58 of the said Act.

18. The next contention of learned Counsel for respondent No.1 is that only because the agreement of sale is not a registered document, it does not become inadmissible in evidence as invalid agreement. He submits that the effect of non-registration of agreement of sale is only that the plaintiff cannot take protection under Section 53-A of the Transfer of Property Act under the terms of this agreement. He placed reliance on the cases of **“Subodh Lallubhai Bhansali and another Vs. Moreshwar Dahanukar and others”** (AIR 2012 Bombay 144),

“M.M.S. Investments Madurai Vs. Veerappan and others” (AIR 2017 SC 2663), “Devinder Singh Vs. Mansha Singh and others” (AIR 2003 Punjab and Haryana 166), “Md. Nehaluddin Vs. Md. Sajid” (AIR 2007 Patna 143), “Narinderjit Singh Vs. North Star Estate Promoters Limited” (AIR 2012 SC 2035), “Prakash Chandra Vs. Narayan” (AIR 2012 SC 2826) and “Deendayal Vs. Smt. Harjot Kanwar and other” (AIR 2003 Rajsthan 202)

19. The following points arise for our consideration and we have recorded our findings thereon for the reasons stated below.

POINTS

FINDINGS

- | | |
|---|----------------------------|
| <p>1 Does the plaintiff prove that on :-
18.01.2011 defendant No.1 agreed to
sell the suit property to plaintiff for
the consideration of Rs.
2,11,00,000/-,after receiving earnest
amount of Rupees Two Crore?</p> | <p>In the affirmative.</p> |
| <p>2 Does defendant No.1 prove that on :-
18.01.2011 he executed agreement
of sale as collateral security for the
investment of Rupees Two Crore by
plaintiff in Yog Industries?</p> | <p>In the negative.</p> |

- 3 Does the plaintiff prove that he was :- In the affirmative.
and is all along ready and willing to
perform his part of contract?
- 4 Do defendant Nos.1 to 4 prove that :- In the negative.
they are bonafide purchasers for
valuable consideration and without
notice of sale agreement in between
plaintiff and defendant No.1?
- 5 Whether the judgment and decree :- In the affirmative.
passed by the trial Court is correct
and proper?

20. In the case at hand before considering the merits of the matter certain facts need to be considered at this appellate stage. Defendant Nos.2 and 3 did not appear before the trial Court though served with suit summons and in the result they were proceeded exparte. Therefore, the position is that, defendant Nos.2 and 3 deemed to have admitted the case of plaintiff. Even defendant No.1, who is the main contesting party in the suit though resisted suit claim by filing elaborate written statement, after passing of decree for specific performance and possession of the suit property by trial Court, did not challenge the same by filing appeal. Therefore, the decree for specific

performance and for possession of suit property has reached to finality so far as defendant No.1 is concerned.

21. Defendant No.1 is the original owner of the suit property and defendant No.3 is purchaser of suit property even after execution of agreement of sale by defendant No.1 in favour of plaintiff. Defendant Nos.4 to 6 are subsequent purchasers of the suit property from defendant No.3. Thus, defendant Nos.4 to 6 stand in the shoes of defendant No.3, as second subsequent purchasers. No privity of contract is in between the plaintiff and defendant Nos.4 to 6. Therefore, the defences available to defendant No.1 – owner challenging the nature of agreement dated 18.01.2011 (Exh.22), are not available to defendant Nos.4 to 6 who are the subsequent second purchasers. Therefore, under Section 19 (b) of the Specific Relief Act 1963, specific performance of contract of sale of suit property can be enforced even against defendant Nos.4 to 6 except when they can prove that they are transferee for value who have paid their money in good faith and without notice of original contract. Same defence is available to subsequent purchaser i.e. defendant No.3. Therefore, unless it is proved that defendant No.3 is transferee

for value who has paid his money in good faith and without notice of original contract, the defence under Section 19 (b) of Specific Relief Act is not available to defendant Nos.4 to 6.

22. In the case at hand, as rightly pointed out by learned Counsel for respondent No.1, in the written statement the defence taken by defendant Nos.4 to 6 under Section 19 (b) of Specific Relief Act is absolutely vague. Defendant Nos.4 to 6 merely pleaded that they are bonafide purchasers of the suit property. However, for availing defence under Section 19 (b) of Specific Relief Act, it must be specifically pleaded and proved that defendant Nos.4 to 6 are transferee for value who have paid their money in good faith and without notice of original contract. In the pleading defendant Nos.4 to 6 have nowhere pleaded that they had no notice of original contract in between plaintiff and defendant No.1 and they paid valuable consideration to defendant No.3 in "good faith". Thus, the pleading of defendant Nos.4 to 6 is lacking for taking defence under Section 19 (b) of Specific Relief Act.

23. Even the above-referred defective pleading of

defendant Nos.4 to 6 is ignored for the sake of discussion, then after going through evidence placed on record, it emerges that defendant No.1 Yogesh Jadhav (DW-1), who deposed on oath to substantiate his defence, in cross-examination admitted that he sold out the suit property in favour of defendant No.3 Ramesh Patil for the consideration of Rs. 40,96,000/- and prior to execution of sale deed in favour of defendant No.3 he had informed defendant No.3 about agreement of sale taken place in between defendant No.1 and plaintiff. This clear admission is sufficient to hold that at the time of purchasing the suit property from defendant No.1 on 04.08.2011, defendant No.3 had notice of agreement of sale dated 18.01.2011 executed by defendant No.1 in favour of plaintiff. Therefore, obviously defendant No.3 cannot become purchaser without notice of the previous sale agreement in between plaintiff and defendant No.1.

24. Another important aspect is that, from the evidence on record it emerges that though defendant No.3 paid consideration of Rs. 40,96,000/- to defendant No.1 at the time of sale transaction dated 04.08.2011, when the suit property was put in auction by Co-operative Bank, that time defendant No.3

deposited additional amount of Rs. 33,00,000/- before the Debt Recovery Tribunal and got released the suit property from the charge of Co-operative Bank. It suggests that in addition to consideration of Rs. 40,96,000/- defendant No.3 has also paid Rs. 33,00,000/- towards the consideration of suit property. Thus, the total consideration of the suit property paid by defendant No.3 to defendant No.1 comes to Rs. 73,96,000/-. In addition to this, he has also spent substantial amount towards expenses for registration of the sale deed. However, the sale deed (Exh.85) dated 30.12.2013 of the suit property executed by defendant No.3 in favour of defendant Nos.4 to 6 shows that the suit property was sold out by defendant No.3 to defendant Nos.4 to 6 for the consideration of Rs. 43,00,000/- only. It is very hard to accept that a person who has purchased the suit property on 04.08.2011 for the consideration of Rs. 73,96,000/-, would sell out the same property after more than three years for lessor consideration of Rs. 43,00,000/-. Thus, obviously defendant Nos.4 to 6 purchased the suit property for depressed consideration and the same transaction cannot be considered as bonafide transaction. In other words, defendant Nos.4 to 6 cannot prove that they are transferee for value who have paid their money in "good faith".

On the other hand, as observed above, the sale of suit property by defendant No.3 to defendant Nos.4 to 6 on 30.12.2013 for depressed consideration of Rs. 43,00,000/- is certainly a doubtful transaction and it cannot be treated as 'bonafide transaction'.

25. Another damage blow to the case of defendant Nos.4 to 6 is that, though they claim that before purchasing the suit property from defendant no.3 they issued public notice in Lokmat newspaper, after going through the so called proclamation / public notice (Exh.91), it shows that it was published in Lokmat daily newspaper on 31.12.2013 i.e. after execution of sale deed (Exh.85) by defendant No.3 in favour of defendant Nos.4 to 6 on 30.12.2013. Neither defendant Nos.4 to 6 could take notice of registered development agreement dated 25.04.2012 in between defendant Nos.1 and 2 nor they called upon objection of plaintiff or other interested persons before obtaining registered sale deed of suit property from defendant No.3. These circumstances on record are sufficient to hold that neither defendant No.3 is transferee for value who has paid his money in good faith without notice of original contract, nor defendant Nos.4 to 6 are bonafide purchasers for valuable consideration and without notice of

original contract of sale in between plaintiff and defendant No.1. As defence under Section 19 (b) of Specific Relief Act is not available to defendant No.3 and defendant Nos.4 to 6, they cannot avail the protection provided to the subsequent purchaser under Section 19 (b) of the Specific Relief Act. We hold that defendant Nos.4 to 6 failed to prove that they are bonafide purchasers of the suit property for valuable consideration without notice of previous agreement of sale dated 18.01.2011 executed by respondent No.1 in favour of plaintiff. We answer point No.4 in the negative.

26. Even assuming that defendant Nos.4 to 6 can take defence available to defendant No.1, in the case at hand defendant No.1 has not disputed execution of agreement of sale dated 18.01.2011 (Exh.22) in favour of plaintiff as well as receipt of amount of Rupees Two Crore, which was credited in the bank account of Yog Industries as per the instructions of defendant No.1. Defendant No.1 Yogesh Jadhav (DW-1) has admitted in his cross-examination that, "it is true to say that out of which the amount of Rupees Two Crore has been deposited by plaintiff in the account of Yog Industries as per my instructions". In

addition to this, by examining attesting witness (PW-2) the plaintiff has duly proved execution of agreement of sale dated 18.01.2011 by defendant No.1 in favour of plaintiff after receiving earnest amount of Rupees Two Crore. Even in the recitals of agreement of sale (Exh.22) it is specifically mentioned that out of the total consideration of Rs. 2,11,00,000/-, on the date of agreement the amount of Rupees Two Crore was credited in the account of Yog Industries Limited under Cheque No. 421714 dated 13.01.2011 by RTGS and defendant No.1 had received the same. In view of this evidence on record, the plaintiff has discharged initial burden of proof to prove execution of agreement of sale dated 18.01.2011 (Exh.22) by defendant No.1 after receiving earnest amount of Rupees Two Crore, for the suit property.

27. Now onus shifts on defendant No.1 to substantiate his defence regarding execution of document of agreement of sale as “collateral security” towards investment of Rupees Two Crore by plaintiff in Yog Industries run by Narendra Jadhav (brother of defendant No.1), who had secured order of supply of Urea Fertilizers through an undertaking of Government of India,

Ministry of Chemical and Fertilizers. To substantiate this defence, the burden lies on defendant No.1 to prove that prior to 18.01.2011 i.e. prior to execution of agreement of sale his brother Narendra Jadhav had secured an order of supply of Urea Fertilizers through Government undertaking, Ministry of Chemical and Fertilizers. However, cat has come out of the bag when defendant No.1 Yogesh Jadhav (DW-1) was subjected to searching cross-examination by the learned Counsel for plaintiff. Yogesh Jadhav (DW-1) has admitted in his cross-examination that there is no documentary evidence placed on record to show that Yog Industries' tender was accepted by Government authorisaing to supply Urea and DAP Fertilizers. He also admits that his brother or Yog Industries never purchased any Urea and DAP Fertilizers from the market. Thus, the purpose for investment of Rupees Two Crore by plaintiff in Yog Industries is not established by defendant No.1 to show that the payment of Rupees Two Crore was towards investment by plaintiff in Yog Industries, in the business of supply of Urea to Government undertaking.

28. Another important aspect to be noted is that though

defendant No.1 claimed that he was raising funds for Yog Industries run by his brother as that industry was in need of financial assistance, Yogesh Jadhav (DW-1) admits in his cross-examination that he was not informed in writing by his brother to raise funds for Yog Industries. He also admits that at that relevant time he was not in a position to provide financial assistance to his brother. He also admits that agreement of sale was executed by him and the amount was credited in the account of Yog Industries as per the instructions of defendant No.1. He also admits that the said amount was credited in the account of Yog Industries to run its business. Thus, the admissions of Yogesh Jadhav (DW-1) clearly suggest that on 18.01.2011 when defendant No.1 executed agreement of sale of suit property in favour of plaintiff, he instructed to credit the earnest amount of Rupees Two Crore in the account of Yog Industries for smooth running of that industry. It was financial aid by defendant No.1 to his brother and not the investment of plaintiff in the said business.

29. Even in the agreement of sale (Exh.22) the defendant

No.1 has specifically admitted that he was selling the suit property for his personal need of money. Thus, if the above admissions are considered together with the recitals of agreement of sale (Exh.22), it becomes clear that at that relevant time the brother of defendant No.1 was in need of financial assistance to run his Yog Industries and for that requirement defendant No.1 agreed to sell the suit property and credited earnest amount in the account of Yog industries as financial assistance on his behalf.

30. From the cross-examination of Yogesh Jadhav (DW-1) it further emerges that it was the investment on the basis of profit sharing and it was agreed to pay interest at the rate of Rs.10% per annum on invested amount. However, since 18.01.2011 till date of recording evidence, even a single paisa was not paid to the plaintiff out of the amount of Rupees Two Crore alleged to be invested. These admissions of Yogesh Jadhav (DW-1) falsifies his own contention that plaintiff invested an amount of Rupees Two Crore in the business of Yog Industries and agreement of sale was executed only as collateral security.

31. Though the learned Senior Counsel for the appellants

has drawn our attention towards the entries in the account of plaintiff Firm which do not show payment of earnest amount of Rupees Two Crore for purchase of any property, that cannot be a ground to reject the case of plaintiff. At the most it can be said that the plaintiff Firm did not maintain its account properly.

32. Learned Senior Counsel has drawn our attention towards the conduct of plaintiff that before executing the agreement of sale, he did not issue public notice, he did not verify the title of defendant No.1, he did not make inquiry of market price and did not take possession of the suit property. However, from the evidence on record, it emerges that at the relevant time of transaction the relations between plaintiff and defendant No.1 were cordial. Therefore, if the plaintiff allowed defendant No.1 to continue his possession over the suit property as some household articles of defendant No.1 were lying in it, it does not become abnormal conduct of the plaintiff. So also the inquiry regarding clear title of defendant No.1 can be made even at the time of execution of sale deed. Therefore, only on the basis of above-referred conduct of plaintiff, his case cannot be doubted.

33. In the circumstances, I have no hesitation to hold

that defendant No.1 miserably failed to discharge the burden to prove that on 18.01.2011 plaintiff invested an amount of Rupees Two Crore in Yog Industries and the agreement of sale (Exh.22) was executed by defendant No.1 as collateral security for the invested amount. In the result, as observed above, the plaintiff has duly proved that on 18.01.2011 defendant No.1 accepted the earnest amount of Rupees Two Crore from the plaintiff and by executing written agreement of sale, agreed to sell the suit property to the plaintiff for total consideration of Rs. 2,11,00,000/-. I answer point No.1 in affirmative and point No.2 in negative.

34. From the agreement of sale (Exh.22) it emerges that out of total consideration of Rs. 2,11,00,000/-, substantial amount of Rupees Two Crore was already paid by plaintiff to defendant No.1 as earnest amount. The remaining amount of Rs. 11,00,000/- was to be paid at the time of execution of sale deed. As per the terms of agreement the responsibility lies on defendant No.1 to obtain no dues certificate from Shriniketan Co-operative Housing Society, Aurangabad and to obtain no objection certificate for transfer and plot allotment from

Shriniketan Co-operative Housing Society. The responsibility also lies on defendant No.1 to get measured the suit property. Unless the work of this documentation is complied by defendant No.1, no responsibility lies on plaintiff to pay the balance amount of Rs. 11,00,000/- to defendant No.1. However, undisputedly the required documentation was not complied by defendant No.1. In the result, the plaintiff was constrained to issue notice to defendant No.1 demanding execution of sale deed after due compliance of documentation and receipt of balance consideration. The notice issued by plaintiff to defendant No.1 was not received by him though intimation of that notice was given to him by Postal Department. These circumstances are sufficient to hold that the plaintiff was all along ready and willing to perform his part of contract. On the other hand, defendant No.1 committed breach of contract. I answer point No.3 in affirmative.

35. Before parting with the judgment, I must consider the most important objection raised by learned Senior Counsel for the appellants. Learned Senior Counsel has pointed out that the agreement of sale is executed on insufficient stamp duty as

required under Article 25 of Maharashtra Stamp Act. No doubt in the case of **“Omprakash Vs. Laxminarayan”** (supra) the Apex Court has made it clear that, it is the recitals contained in the document that are decisive and conclusive of its admissibility. Therefore, when in the recitals of agreement of sale it is mentioned that possession of the suit property was delivered to the plaintiff, under Article 25 of Maharashtra Stamp Act, Explanation I, the agreement (Exh.22) shall be deemed to be conveyance and stamp duty thereon shall be leviable accordingly.

36. However, learned Counsel for respondent No.1 has rightly drawn our attention to Section 35 of the Maharashtra Stamp Act which provides that where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

37. In the case at hand, the agreement of sale (Exh.22) was admitted in evidence on the basis of oral evidence of plaintiff (PW-1) and evidence of attesting witness (PW-2), without any objection by any defendant on record. It is to be noted that at

that relevant time defendant Nos.2 and 3 were proceeded exparte and defendant No.1 though appeared, did not file written statement and therefore, the suit was proceeded without written statement of defendant No.1. Even at the stage of recording of evidence of both witnesses, defendant No.1 did not take objection regarding admissibility of this document. The record shows that “no WS” order passed by trial Court against defendant No.1 was subsequently set aside and defendant No.1 filed his written statement on 07.02.2015.

38. Subsequently by filing application (Exh.33) objection was raised regarding admissibility of this agreement (Exh.22) on the ground of payment of insufficient stamp duty. That application was rejected by trial Court relying on the judgment in the case of **“Shamlal Vs. Sushil” (AIR 2007 SC 637)** wherein the Apex Court held that when an instrument has been admitted in evidence, such admission shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Subsequently defendant Nos.4 to 6 were joined as party to this litigation. Even defendant Nos.4 to 6 filed application (Exh.97) for impounding of this

document. This application filed by defendant Nos.4 to 6 was rejected by trial Court on 12.04.2017 in view of the previous elaborate order passed below Exh.33. Against these both orders no revision was filed by defendant No.1 or defendant Nos.4 to 6, as provided under Section 58 of the Maharashtra Stamp Act. The Apex Court in the case of **“Javer Chand and others Vs. Pukhraj Surana” (AIR 1961 SC 1655)** held that, “where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, the party challenging the admissibility of the document has to be alert to see that the document is not submitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 comes into operation. Once a document has been admitted in evidence, as afore-said, it is not open either to the trial Court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial

orders which are liable to be reviewed or revised by the same court or a court of superior jurisdiction". Same law was reiterated by the Apex Court in the case of **"Shamlal Vs. Sushil"** (supra) and Division Bench of this Court in the case of **"Shree Chaitanya Constructions Vs. Poonamchand Dalichand Parakh and others"** [2018 (2) ABR 597].

39. In view of this settled position of law, as defendant No.3 and defendant Nos.4 to 6 have not resorted to the procedure under Section 58 of Maharashtra Stamp Act after rejection of their applications (Exhs.33 and 97), now at this appellant stage the appellants cannot dispute the admissibility of agreement of sale (Exh.22) on the ground of payment of insufficient stamp duty. Thus, the objection raised by learned Senior Counsel regarding the admissibility of agreement of sale (Exh.22) on the ground of insufficient stamp duty, is rejected.

40. Learned Senior Counsel has also objected the admissibility of this agreement of sale as it is un-registered document though the recitals of the document show delivery of possession to the plaintiff. However, the amended Section 17 (1A) of the Registration Act, 1908 reads as under :-

“17 (1A) - The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 (48 of 2001) and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A”.

41. A bare glance at Section 17 (1A) of the Registration Act makes it clear that for the reason of non-registration of agreement of sale it does not become invalid or inadmissible in evidence. The effect of non-registration of agreement of sale is that the plaintiff would not be in a position to take protection under Section 53A of the Transfer of Property Act, 1882. Therefore, on the ground of non-registration of agreement of sale (Exh.22), it does not become invalid or inadmissible in evidence. The second objection raised by learned Senior Counsel about the admissibility of agreement of sale (Exh.22) on the ground of non-registration of agreement of sale, is rejected.

42. In view of the above discussion, we have no hesitation to conclude that the decree for specific performance of contract of sale and for possession of the suit property passed by the trial Court is correct, proper and needs no interference. It follows that

this appeal fails and deserves to be dismissed. We answer point No.5 in the affirmative.

43. In the result, First Appeal No.3565 of 2017 is dismissed. Parties to bear their respective costs of the appeal. Civil Application No.11487 of 2017 is disposed of accordingly.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

vdd/