

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Second Appeal No. 462 of 2018

Bhagwat S/o Daduji Harinkhede,
Versus
Amit S/o Dyaneshwar Zha and another

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri E.S. Sahasrabuddhe, Advocate for appellant.
Shri R.M. Pande, Advocate for respondents

**CORAM : ANIL S. KILOR, J.
DATED : 01 DECEMBER 2021**

This is an appeal arising out of the judgment and decree dated 05/08/2017 passed in Regular Civil Appeal No. 79/2014 passed by the Principal District Judge, Gondia, dismissing the appeal preferred by the original defendant in a suit for specific performance of contract.

2. The brief facts of the present case are as follows. (The parties are referred to as per their status before the trial Court.)

Plaintiff no.1 and 2 have entered into an agreement to sell with defendant on 04/03/2008 and

defendant accepted Rs.41,000/- towards earnest money. It was agreed between the parties that, the sale deed will be executed on or about 31/9/2008 by demarcating the land and after collecting necessary document to register a sale deed. The defendant meanwhile demanded remaining consideration therefore, on 24/04/2008, an amount of Rs.20,000/- was paid by the plaintiff.

3. It is the case of plaintiff, inspite of agreed terms the defendant failed to measure the land from DILR and as such, the transaction could not be completed. As per plaintiffs, they were/are always ready and willing to perform their part of contract, but defendant failed to perform his part of contract and therefore they prayed for decree of Specific Performance of Contract.

4. Defendant filed written statement below Exh.12 & resisted the claim on following grounds:-

5. He was in need of money for repayment of loan to Central Krishak Society and Vijay Shree Sahakari Path Sanstha. Similarly, defendant wanted to marry his son and daughter therefore, he entered into an agreement to sell with plaintiffs. He asked the plaintiffs to pay earnest amount of Rs.80,000/- but defendants only paid Rs.41,000/- and thereafter on

24.4.2008 has paid Rs. 20,000/-. As plaintiffs failed to pay balance consideration as per agreed terms, defendant sustained loss of Rs. 70,000/- therefore, he issued legal notice to the plaintiffs and cancelled the agreement dated 4.3.2008. As per the defendant, he was always ready and willing to perform his part of contract, but the plaintiff failed to pay remaining consideration in time and therefore, sale deed could not be executed. Hence, he prayed for dismissal of suit with compensatory costs.

6. I have heard the learned Counsel for the respective parties.

7. This Court on 27/08/2019 has framed the following substantial question of law.

In the light of law laid down by the Hon'ble Supreme Court in the case of I.S. Sikandar .vs. K. Subramani and others reported in (2013) 15 Supreme Court Cases 27, whether the suit filed by the respondents in the present case was maintainable in the absence of a declaratory relief sought on their behalf in respect of notice dated 20.01.2009 issued on behalf of the appellant cancelling agreement dated 04.03.2008 entered between the parties?

8. The learned Counsel appearing for the appellant submits that on issuance of notice by the defendant to the plaintiff for cancelling the agreement for sale, filing of suit simplicitor for specific performance of contract, is not tenable. But the plaintiff ought to have sought declaration that the notice issued, cancelling the agreement is null and void.

9. It is submitted that in absence of such a declaration, the suit was not maintainable. The learned Counsel for the appellant for this purpose has placed reliance in judgment in the case of I.S. Sikandar Vs K Subramani and others reported in (2013) 15 SCC 27.

10. Per contra learned Counsel for the respondent submits that plea of maintainability was never raised by the defendant in his written statement or even after framing of the issues. It is submitted that on finding that no issue relating to maintainability was framed, he ought to have applied for framing of additional issue on the point of maintainability, which he failed to do. It is further submitted that even it was not raised before the Lower Appellate Court and has raised first time in the second appeal which is not permissible. For this purpose, he is relying upon the judgment of the Hon'ble Supreme Court of India in the

case of A. Kanthamani Vs. Nasreen Ahmed reported in (2017) 4 SCC 654.

11. To consider the rival contentions of the parties, I have gone through the record and also perused the judgments cited by both the parties.

12. The Hon'ble Supreme Court of India in the case of A. Kanthamani (supra) has observed thus :

30. Coming first to the submission of the learned counsel for the appellant about the maintainability of the suit, in our considered view, it has no merit for more than one reason.

30.1 First, as rightly argued by the learned counsel for the respondent, the objection regarding the maintainability of the suit was neither raised by the defendant in the written statement nor in the first appeal before the High Court and nor in grounds of appeal in this Court.

30.2 Second, since no plea was raised in the written statement, a fortiori, no issue was framed and, in consequence, neither the trial court nor the High Court could render any finding on the plea.

30.3 Third, it is a well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written

statement) then only such plea can be adjudicated by the trial court on its merits as a preliminary issue under Order 14 Rule 2 CPC. Once a finding is rendered on the plea, the same can then be examined by the first or/and second appellate court. It is only in appropriate cases, where the court prima facie finds by mere perusal of plaint allegations that the suit is barred by any express provision of law or is not legally maintainable due to any legal provision; a judicial notice can be taken to avoid abuse of judicial process in prosecuting such suit. Such is, however, not the case here.

30.4 Fourth, the decision relied on by the learned counsel for the appellant in I.S. Sikandar turns on the facts involved therein and is thus distinguishable.

13. The Hon'ble Supreme Court of India after considering the case cited by the appellant in this matter i.e. I.A. Sikandar (supra), has found that the said judgment was based on the facts involved therein. As such it is held to be distinguishable. At the same time, the Hon'ble Supreme Court of India has held that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement), then only such plea can be adjudicated by

the Trial Court on its merit as a preliminary issue under Order 14, Rule 2 of the Code of Civil Procedure. Once the finding is rendered on the plea, the same can then be examined by the first or/and Second Appellate Court. It is only in appropriate cases, where the Court prima facie finds by mere perusal of plaint allegations that the suit is barred by any exclusive provisions of law or is not legally maintainable due to any legal provision. A judicial notice can be taken to avoid abuse of judicial process in prosecuting such suit.

14. In absence of above referred prerequisite to examine issue of maintainability and in absence of plea raised by the defendant in the written statement at the first instance, I am of the considered view that there is no merit in the present appeal.

15. The judgment cited by the learned counsel for the appellant in case of I.S. Sikandar is distinguishable on fact and therefore the said judgment is not of help to the appellant. Accordingly, I have answered the substantial question of law in the above terms.

16. Now, at this stage, learned Counsel for the appellant submits that this Court may consider to frame additional substantial question of law on the point of

readiness and willingness. According to him both the Courts have committed error in holding that the plaintiff was ready and willing to perform his part of contract.

17. To consider his request, this Court has gone through the findings recorded by both the Courts below. Both the Courts have concurrently held that the plaintiff was ready and willing to perform his part of contract and in that view of the matter as there is a concurrent finding and in absence of any perversity pointed out in recording aforesaid findings, no additional substantial question of law is involved in this matter. Accordingly, the appeal is dismissed. No order as to costs.

[ANIL S. KILOR, J.]