

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 179 OF 2020

Shri Ramchandra S/o Mahadevrao Dongre,
Aged about 60 years, Occ. Agriculturist,
R/o At Post Murti, Tahsil :Katol, District Nagpur.

.... **APPELLANT.**

(Ori. Defendant)

// VERSUS //

Sau Mandabai W/o Madhukarrao Bobde,
Aged about 56 years, Occ. Household,
R/o. Plot No.129, Om Nagar, Nagpur,
Presently residing at Nirmal Nagari,
Umred Road, Nagpur.

.... **RESPONDENT.**

(Ori. Plaintiff)

Shri. R.S.Kalangiware, Advocate for Appellant.
None for Respondent.

CORAM : ANIL S. KILOR, J.

DATED : DECEMBER 07, 2021

ORAL JUDGMENT :

1. This is an appeal arising out of the judgment and decree dated 20th December 2019, passed by the Ad-hoc District Judge-2, Nagpur in Regular Civil Appeal No. 391 of 2017 decreeing thereby the suit filed by the plaintiff/ respondent for specific performance, by setting aside the judgment and decree dated 22/04/2017, passed

in Special Civil Suit No. 1024 of 2019 by Civil Judge Senior Division, Nagpur.

2. Brief facts of the present case are as follows: (Parties are referred to as per their status before the trial Court)

3. It is the case of the plaintiff/ respondent that defendant owns agricultural land bearing survey (Gat) No.75, area admeasuring 2.12 H. area.

4. The plaintiff and defendant entered into an agreement to sell on 18.05.2007 in respect of the suit property for a total consideration of Rs.7,35,000/-. Plaintiff paid an amount of Rs.1,75,000/- to defendant on 18.05.2007 towards part consideration. Prior to that, plaintiff paid an amount of Rs.25,000/- to defendant as a token amount. Defendant agreed to obtain necessary documents and conversion of suit property from Class II to Class I for execution of registered sale deed. Later on, plaintiff paid Rs.1,25,160/- time to time to defendant towards part consideration. Thus, plaintiff paid an amount of Rs.3,00,160/- to

defendant towards part consideration. It was agreed to execute registered sale deed on 28.02.2008.

5. It is alleged that, defendant failed to obtain necessary document and the order of conversion of suit property from class II to class I within stipulated time, therefore, sale deed could not be executed on 28/02/2008. The plaintiff was and is ready and willing to perform her part of contract. The defendant extended further time and therefore, date of performance of contract was 27/10/2009. The Plaintiff requested the defendant to comply with the necessary formalities and to execute the registered sale deed, but the defendant refused. Plaintiff by notice dated 09/09/2009 called upon the defendant to comply with the necessary formalities and to execute the registered sale deed by receiving balance consideration amount. The plaintiff also issued public notice in daily Lokmat dated 08/09/2009. Despite receipt of notice, defendant failed to act upon. Therefore, the plaintiff filed suit against the defendant.

6. The defendant appeared and resisted the claim of the plaintiff by filing written statement at Exh.19. He denied all the

averments made by the plaintiff. He denied about the execution of any agreement to sell of the suit property in favour of the plaintiff and also denied receipt of any amount towards part consideration. He also denied the terms and conditions of the alleged agreement to sell. It is contended that, there is no agreement to sell carried out between the plaintiff and the defendant. The alleged document dated 18/05/2007 is not an agreement to sell, but is an affidavit and the same is not enforceable by law. Plaintiff has no cause of action for filing this suit and therefore, the defendant prayed for dismissal of the suit.

7. The learned trial Court, after considering the oral as well as documentary evidence available on record, dismissed the suit.

8. The plaintiff, being aggrieved by the same, preferred an appeal bearing Regular Civil Appeal No. 391 of 2017 before the Ad-hoc District Judge-2, Nagpur. The learned lower appellate Court vide its judgment and decree dated 20th December 2019 decreed the suit for specific performance in favour of the plaintiff.

The same is under challenge in this appeal.

9. Heard the learned counsel for the appellant. None for the respondent, though served.

10. This Court, on 16th December 2020, has framed the following Substantial Questions of Law :

(i) *“Whether the suit for specific performance in the specific facts and circumstances of the case, in the absence of relief of declaration for rescission of contract, is maintainable?”*

(ii) *Whether the finding of the First Appellate Court, with regard to readiness and willingness to perform the contract in favour of the plaintiff, is perverse?”*

11. The learned counsel for the appellant argues that though as per the Agreement, last date for execution of the sale deed was fixed as 28/02/2008 and there was a clause saying that in event of failure to execute the sale deed on or before 28/02/2008, the agreement shall stand cancelled automatically. It is submitted that on receipt of the notice dated 09/09/2009 issued by the plaintiff, in reply to the same, the defendant has made it clear to the plaintiff that on expiry of the time period fixed under the

agreement for execution of the sale deed, the agreement stood cancelled. It is submitted that inspite of the said fact, no declaration has been sought against the said cancellation and therefore, the suit simplicitor for specific performance in this case is not maintainable. For this purpose, he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *I.S. Sikander v/s K. Subramani and others*¹

12. It is submitted that the learned trial Court has rightly observed that the plaintiff was not ready and willing to perform her part of contract as, no sufficient evidence has been brought by the plaintiff on record in support of her readiness and willingness. It is submitted that the oral evidence is not sufficient to point out his readiness and willingness. It is further submitted that it is obligatory on the part of the purchaser to demonstrate that she was and she has been continuously ready and willing to perform her part of the contract. It is submitted that in absence of such evidence, reversal of such finding by the appellate Court is erroneous and not sustainable in the eyes of law.

1 (2013) 15 SCC 27.

13. To consider the contentions raised by the learned counsel for the appellant, I have gone through the record and also perused the judgment and decree of both the Courts below.

14. The Hon'ble Supreme Court of India in the case of *I.S. Sikander* (supra) has held thus:

“36. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the agreement of sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the agreement of sale between the plaintiff and Defendants 1-4 w.e.f. 10.04.1985.

37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement to sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of consequential relief of decree for permanent injunction is not maintainable in law.”

15. In this case, the learned trial Court has held that in the Agreement to Sell Exh.29, it is specifically mentioned that in case the plaintiff fails to execute the registered Sale Deed on or before 28/02/2008, the Agreement to Sell shall stand cancelled and the amount paid by the plaintiff will be forfeited. It has come on record

that though in the said agreement, last date for execution of the Sale Deed was 28/02/2008, the plaintiff had issued notice for the first time on 09/09/2009 to the defendant calling upon the defendant to execute the Sale Deed within 15 days. It has further come on record that the defendant in his reply Exh.34 issued on 16/09/2009, specifically informed to the plaintiff that as the plaintiff has failed to execute the Sale Deed within the stipulated period i.e., on or before 28/02/2008 and thereby failed to perform the contract as agreed, her earnest amount was liable to be forfeited and she was not entitled for asking specific performance of contract. This intimation of termination of contract has not been challenged in the suit and therefore, the suit was dismissed.

16. However, the learned lower appellate Court has observed that there was extension of time period and it was extended up to 27.10.2009. The court has relied for this purpose a hand written chit which was filed along with the agreement (Exh.29). The lower appellate Court on the basis of this document has held that there was an extension of time and therefore, it cannot

be said that there was a termination of the contract.

17. After going through the said document whereby it is alleged that the time has been extended, it is clear that the date extending time, there is some scoring made in the date and particularly in the year. It can be seen with the naked eyes that earlier it was “2008” which had been re-written as “2019”.

18. Moreover, this document shows that payment of Rs.45,000/- was made by cheque, however, there is no mention of cheque number or any other details. Even, no evidence has been produced by the plaintiff in support of this document, particularly about the payment of Rs.45,000/- to the defendant.

19. In absence of any cogent and sufficient evidence, to hold that there was an extension of time, the reversal of the findings recorded by the learned lower appellate Court to the effect that in absence of declaration sought by the plaintiff as regards the termination of contract, the suit was not maintainable, is erroneous and not sustainable in the eyes of law.

20. Thus, it is clear that the findings recorded by the learned lower appellate Court in relation to extension of time period for execution of the sale deed is without evidence and the said finding is perverse. Accordingly, I answered the first Substantial Question of Law in above terms.

21. As regards the readiness and willingness, having held by this Court that there was no extension of time and as per the agreement, the last date for execution of the sale deed was 28/02/2008, the notice by the plaintiff to the defendant calling upon him to execute sale deed, was admittedly issued on 09/09/2008 i.e., after a period of more than 1½ years. In cross-examination, the plaintiff has specifically admitted the fact that prior to 09/09/2009, he did not make any correspondence with the defendant.

22. The Hon'ble Supreme Court of India in the case of *N.P.Thirugnanam ..vs. Dr. R. Jagan Mohan Rao*² has held thus:

“It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to

settled principles of law and not arbitrarily as adumbrated under s.20 of the Specific Relief Act 1963 (for short, 'the Act'). Under s.20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract.”

23. In this matter, the plaintiff has pleaded only readiness and willingness, however, failed to prove that she was or has always been ready and willing to perform essential terms of the contract which are to be performed by her, other than those terms the

performance of which has been prevented or waived by the defendant.

24. The plaintiff further failed to prove the continuous readiness and willingness on her part. Moreover, the conduct of the plaintiff which is relevant in such matters, shows that the plaintiff did not take any steps in the matter to get the sale deed executed. The time period fixed for execution of the sale deed and issuance of notice first time after 1 ½ years is sufficient to hold that the plaintiff was not ready and willing to perform her part of the contract. Accordingly, in view of the above findings recorded, I am also of the opinion that the judgment and decree passed by the learned appellate Court is liable to be set aside. Accordingly, I pass the following order:

- i) The appeal is allowed.
- ii) The judgment and decree dated 20/12/2019 passed by Ad-hoc District Judge-2, Nagpur in Regular Civil Appeal No.291 of 2017 is hereby quashed and set aside.

iii) The judgment and decree dated 22/04/2017 passed by the Civil Judge Senior Division, Nagpur in Special Civil Suit No. 1024 of 2009 is confirmed.

The Second Appeal is **disposed of** accordingly. No order as to costs.

(ANIL S. KILOR, J)

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