

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

SECOND APPEAL NO. 44 OF 2019

APPELLANT : Khushab s/o Suryabahan Hadke
Aged 67 years, Occu: Agriculturist,
R/o Karur (Ekburje), Tah.
Samudrapur, Dist. Wardha.

...V E R S U S...

RESPONDENTS : Bhaskar s/o Ramkrushna
Deshpande (dead) Legal
representative.

1] Manjiri w/o Mukund Waghmare
Age 52 years, Occu: Household,
R/o Gandhibagh, Jalalpura,
Sharda Square Nagpur.

2] Vijayanti Shrikant Deshpande,
Age 49 years, Occu: Household,
R/o Hanuman Nagar, Nagpur.

Shri D.S. Lambat, counsel for the appellant.
Shri V. U. Waghmare, counsel for the respondent Nos. 1 & 2.

CORAM : ANIL S. KILOR, J.
DATE : 30th NOVEMBER, 2021

ORAL JUDGMENT :

1. The present appeal is arising out of the judgment and decree dated 07.02.2018, maintaining the judgment and decree passed in Regular Civil Suit No. 228/2008 dated 07.03.2014 passed by the 2nd Joint Civil Judge, Junior Division, Samudrapur, dismissing the suit for specific performance of contract, declaration and permanent injunction.

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

3. The Defendant is the owner of field Survey No.116/1 comprising of area 20.71 H.R. Mouza Karur (Ekburje), Tahsil – Samudrapur, Distt. Wardha. The Plaintiff contends that on 08.05.1991 the defendant agreed to sell 1.00 H.R. land out of aforesaid land by dividing it and they executed an agreement to that effect on 08.05.1991. Total consideration agreed was Rs. 10,625/-. The Plaintiff had paid earnest money of Rs. 5,000/- to defendant, remaining amount was to be paid at the time of sale. The land agreed to be sold was under Pothara Project; for that permission of Collector for conveyance was necessary. The Defendant agreed to sought the permission and thereafter, to execute sale deed.

4. According to plaintiff at the time of execution of

earnest note he was put into possession of the land. The Defendant did not applied to the office of Collector for permission and failed to executed the sale deed. It is further case of plaintiff that the Defendant was trying to sale his land to third person. Therefore, plaintiff had issued registered notice on 13.05.2008 to the defendant. Plaintiff issued second notice on 24.05.2008. Both these notices were refused by defendant. As per plaintiff he is in cultivating possession. He is ready and willing to perform his part of the contract. Hence, he filed the aforementioned suit.

5. The suit was proceeded *ex-parte* against defendant.

6. The learned trial Court after considering the oral as well as documentary evidence, dismissed the suit vide judgment and decree dated 07.03.2014.

7. The said judgment and decree came to be assailed at the instance of plaintiff in Regular Civil Appeal No. 228/2008 which was dismissed by the learned First Appellate Court vide impugned judgment and decree dated 07.02.2018, which is under challenge in this appeal.

8. I have heard Shri D.S. Lambat, learned counsel for the appellant.

9. It is submitted that though the appellant was always ready and willing to perform his part of the contract,

both the Courts below have committed error in recording that the plaintiff was not ready and willing to perform his part of the contract and accordingly the suit was dismissed.

10. It is further submitted that protection under Section 53-A of the Transfer of Property Act has been denied by both the Courts below to the plaintiff/appellant.

11. It is further pointed out that in the agreement, there was a specific mention about the fact that the land comes within the Pothara Land Project and therefore, permission of the Government was necessary for the execution of the sale-deed which was to be obtained by the Vendor i.e. the defendant and because he failed to obtain the permission, the plaintiff cannot be blamed for the same and relief sought cannot be denied.

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

13. While dealing with an issue as regards the readiness and willingness, both the Courts have held that, it is necessary for the matter of specific performance to consider the conduct of the persons seeking decree of specific performance and while observing the conduct of the plaintiff, both the Courts have concurrently held that nothing has been

brought on record by the plaintiff to show that for 17 years i.e. from the date of agreement dated 08th May, 1991, till the date of issuance of notice in the year 2008, what steps the defendant had taken in this matter to get the sale-deed executed in his favour. Both the Courts have dealt with the said issue in detail and after observing that the plaintiff has failed to take necessary steps to get the sale-deed executed, it is held that the plaintiff was not ready and willing to perform his part of the contract which is the prerequisite condition for passing a decree of specific performance.

14. In support of the contention that protection under Section 53-A ought to have been granted by both the Courts below, as admittedly the plaintiff is in possession of the suit property, Shri D.S. Lambat, learned counsel for the appellant has placed reliance on the judgment of the Hon'ble Supreme Court of India in ***Shrimant Shamrao Suryavanshi and another Vs Pralhad Bhairoba Suryavanshi (dead) by LRs and others***¹. The Hon'ble Supreme Court of India in the said judgment has held that :-

“But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are :

- (1) there must be a contract to transfer for consideration of any immovable property;*
- (2) the contract must be a writing, signed by the transferor, or by someone on his*

1 (2002) 3 SCC 676

behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract.”

15. After going through the six prerequisites enumerated in the above-referred judgment and considering the findings of facts recorded by both the Courts below in this matter, I have no doubt that condition Nos. 5 and 6 have not been complied by the plaintiff in this matter.

16. In that view of the matter, as the plaintiff is not fulfilling the prerequisites for granting protection under Section 53-A of the Transfer of Property Act, both the Courts have rightly denied protection to the plaintiff.

17. The learned counsel for the appellant, at this stage supplied the copy of a judgment dated 27th January, 2014 passed by the Civil Judge, Junior Division, Samudrapur in Regular Civil Suit No.155/2008, in a suit for specific performance filed against the defendant by one Bandu Ramdas Chanekar.

18. Shri D.S. Lambat, learned counsel for the

appellant would submit that the said suit was partly decreed in similar facts and circumstances however, in the present matter the decree has been denied.

19. This judgment was never produced before the learned Lower Appellate Court and what evidence oral as well as documentary was available in that matter for decreeing the suit has not been pointed out. In that view of the matter, merely producing the judgment is not sufficient to reverse the judgment of the Lower Appellate Court.

20. Learned counsel for the appellant has failed to point out any perversity in the findings recorded by both the Courts below. In that view of the matter, looking to the jurisdiction of this Court under Section 100 of the Code of Civil Procedure, I do not find any substantial question of law is involved in this appeal.

21. Accordingly, I pass the following order :-

ORDER

- a] The appeal is dismissed.
- b] Pending application (s), if any, stand(s) disposed of. No order as to costs.

[ANIL S. KILOR, J.]