

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

SECOND APPEAL NO.179 OF 2022

Barku Baliram Sonwane
Age : 35 years, Occu: Agriculture
R/o. Shindol, Tq. Soygaon,
District Aurangabad.

... **APPELLANTS**

VERSUS

1. Devidas Bapu Patil
Age : 34 years, Occu: Labour,
R/o. Shindol, Tq. Soygaon,
District Aurangabad.
2. Tukaram Bhila Borse
Age : 55 years, Occu: Agriculture
R/o. Shindol, Tq. Soygaon,
District Aurangabad.

... **RESPONDENTS**

...
Advocate for Appellant : Mr. Anil S. Bajaj

...
CORAM : MANGESH S. PATIL, J.

DATE : 04.04.2022

PER COURT :

This is a second appeal by the original plaintiff who has failed to secure specific performance of an agreement to sell the suit property executed by the defendant No.1.

2. It was averred that by the agreement dated 17.01.2014 the respondent No.1 had agreed to sell the suit property to the appellant for a consideration of Rs.6,50,000/- by accepting the earnest of Rs.1,25,000/-. The sale deed was to be executed by 17.01.2015. But within couple of months of the agreement the respondent No.1 sold the suit property to the respondent No.2 on 12.03.2014. The appellant filed the suit for specific performance. The trial court upheld the execution of an agreement of sale

in favour of the appellant but recorded a finding that he had failed to aver and prove that he was ready and willing to perform his part under the agreement as is required by Section 16 (c) of the Specific Relief Act, 1963. It also record a finding that respondent No.2 was a *bona fide* purchaser of the suit property without notice of the existence of the previous agreement.

3. The lower appellate court has concurred with the observation and the conclusion of the trial court on both the counts.

4. The learned advocate Mr. Bajaj for the appellant would submit that the readiness and willingness is a matter to be understood and gathered from all the attending circumstances. No specific phraseology is required to be used in the plaint. The conduct of the appellant was relevant who was in possession of the suit property and in fact had no time to demand specific performance before filing the suit in as much as the sale deed in favour of the respondent No.2 was executed within two months of his agreement.

5. He would further submit that both the courts below have given unnecessary importance to the absence of the averment in the plaint. He would place reliance on the decision in the case of **Motilal Jain V/s Ramdasi Devi (Smt) and Ors.; (2006) 6 Supreme Court Cases 420** to buttress his submission that it is a conduct of a party claiming specific performance which is more important than any specific phraseology to be used in the plaint.

6. The learned advocate would further submit that both the courts have erroneously insisted for a proof regarding availability of resources with

the appellant to pay the balance amount of consideration and have recorded a perverse finding.

7. The learned advocate would further submit that conduct of the respondent No.2 is also relevant. A huge amount of Rs.10,00,000/- was shown to have been paid in cash while getting the sale deed executed which is improbable and even illegal. He would further submit that the fact that the appellant is in possession of the suit property stands duly proved. If that be so, it is highly improbable that the respondent No.2 would have parted with huge sum even without getting possession. All these circumstances were indicative of the fact that the respondent No.2 was not *bona fide* purchaser of the suit property.

8. I have carefully considered the pleadings, the evidence and the judgments of the courts below. Needless to emphasize that this Court has inherent limitations in exercising the powers under Section 100 of the Civil Procedure Code more so when there are concurrent finding of the facts by the courts below. Merely because a view different than the one taken by the courts below is available for this court it cannot exercise that power and substitute its view. This court cannot act as a third fact finding court. Suffice for the purpose to refer to the decision and observation of the Supreme Court in the matter of **Hero Vinoth (minor) Vs. Seshammal**; (2006) 5 SCC 545, para 19 and **Narayanan Rajendran and Ors. Vs. Lekshmy Sarojini and Ors.**; (2009) 5 SCC 264, para 64 :

“ 19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of

fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.

64. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on

facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question."

9. Bearing in mind such inherent limitation in the powers of this Court, even if one decides to consider the submissions of the learned advocate for the appellant, it is a matter of record that in spite of a statutory mandate as contained in Section 16 (c) of the Specific Relief Act, the plaint is devoid of any averment in specific words regarding readiness and willingness of appellant to perform his part under the agreement.

10. In the matter of **Motilal Jain** (supra) what is laid down is that the circumstances have to be taken into consideration to gather if a person claiming specific performance is ready and willing albeit appropriate phraseology is not used, like the words readiness and willingness. As can be seen, apart from the fact that the averments are not there in the plaint indicating appellants' readiness and willingness, the circumstance also do not indicate that he was ready and had offered to pay the balance amount of the consideration and get the sale deed executed. I am not on the point as to if he was possessing and required to strictly prove that he was having

resources to pay the balance amount of consideration but what I intend to emphasize is the fact that at least there should have been some vague averment in the plaint showing that he was ready and willing to part with the balance amount of consideration which in the circumstances was a huge one. Out of 6,50,000/- of the total consideration only an amount of Rs.1,25,000/- was paid and the balance was still to be paid. As can be seen, in the matter of **Motilal Jain** (supra) 2/3rd of consideration was parted with by the purchaser. This is not the state of affairs in the matter in hand. The circumstances indicating that the appellant was ready and willing to perform his part under the agreement are missing, albeit the trial court and the appellate court have not proceeded on similar lines while arriving at a finding of fact that he was not ready and willing to perform his part of the agreement.

11. Again, so far as the plea of the respondent No.2 of being a *bona fide* purchaser for value without notice of previous agreement, true it is that the entire amount of consideration of Rs.10,00,000/- is stated to have been paid by him in cash to the respondent No.1. But then, when it is a sale deed duly registered before the Registrar concerned, one will have to proceed on the premise that the averment in the sale deed about the respondent No.2 having parted with this amount of consideration is a conclusive statement. Therefore, merely because the entire amount of consideration was stated to have been paid in cash cannot be a ground to doubt his *bona fides*.

12. It does appear that the appellant still continues to be in possession of the suit property. However, even if the respondent No.2 has not received possession of the suit property one cannot readily doubt his *bona fides* particularly when, both the courts have for the plausible reasons taken concurrent view of the matter of his being a *bona fide* purchaser.

13. No substantial question of law arises for determination in the Second Appeal. It is dismissed with costs.

(MANGESH S. PATIL, J.)

habeeb