

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

**SECOND APPEAL NO.697 OF 2016 WITH
CIVIL APPLICATION NO.10901 OF 2017 WITH
CIVIL APPLICATION NO.2623 OF 2017**

1. Shri Kishor s/o Chandrakant Bagul,
Age 57 years, Occu. Business,
R/o 13 Bungalow, Indira Path,
At Post &Tq. Kopargaon,
District Ahmednagar
2. Sou. Sushma w/o Kishor Bagul,
Age 50 years, Occu.Agri. & Business,
R/o 13 Bungalow, Indira Path,
At Post &Tq. Kopargaon,
District Ahmednagar

... APPELLANTS
(Orig. Deft.Nos.4 & 5)

VERSUS

1. Shri Rajendra s/o Manikchand Fulphagar,
Age 55 years, Occu. Business,
2. Shri Kishor s/o Manikchand Fulphagar,
Age 54 years, Occu. Business,
3. Shri Dipak s/o Manikchand Fulphagar,
Age 50 years, Occu. Business,
4. Shri Manish s/o Manikchand Fulphagar,
Age 48 years, Occu. Business

All R/o Kapad Bazar, Kopargaon,
Tq. Kopargaon, Dist. Ahmednagar.
5. Suresh s/o Shivram Shirsath,
Dead, through L.Rs.
- 5-A. Mrs. Indrayani Suresh Shirsath,
Age 55 years,
- 5-B. Mrs. Sonali Suresh Shirsath,
Age 43 years

5-C. Mr. Vikram Suresh Shirsath,
Age 42 years.

All R/o Jeur Patoda,
Tq. Kopargaon, Dist. Ahmednagar

6. Sou. Surekha w/o Janardan Rajguru,
Age 70 years, Occu. Household
R/o Main Road, Bhagur, Dist. Nashik

7. Smt. Narmada w/o Jagannath Kharkar,
Age 74 years, Occu. Household,
R/o Anand Gujrat

(Added Respondent Nos.5 to 7 and are
supporting appellants – deft.Nos.1 to 3)

... **RESPONDENTS**

(R.Nos.1 to 4 – Orig. Plaintiffs)

.....

Shri R.N. Dhorde, Senior Counsel instructed by
Shri V.R. Dhorde, Advocate for appellants
Shri Sanket S. Kulkarni, Advocate for R.Nos.1 to 4
Shri N.L. Choudhari, Advocate for R.No.5-C.

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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 19th July, 2022

Date of pronouncing judgment : 5th December, 2022

J U D G M E N T :

This Second Appeal is filed by original defendants
No.4 and 5 against the judgment and decree dated
9/11/2006, passed by the Court of Civil Judge, Senior
Division, Kopargaon in Special Civil Suit No.2/2001, which is
confirmed by the judgment and decree dated 3/5/2016,

passed by learned District Judge-1, Kopargaon in Regular Civil Appeal No.34/2012.

2. For the sake of convenience, parties to this appeal are referred to as per their status in the suit.

It was a suit for specific performance of agreement for sale executed by defendants No.1 to 3 in favour of the plaintiffs on 31/12/1999. The subject matter of the suit was agricultural land admeasuring 1 H 85 R, particularly described in paragraph No.1 of the plaint. It was a registered agreement for sale (Exh.99) for consideration of Rs.7,51,000/-. The plaintiffs paid the defendants No.1 to 3 a sum of Rs.51,000/- as earnest money on the day the agreement was executed. The balance consideration amount was to be paid at the time of execution of the sale deed, which was to be executed after the suit land was measured and its boundaries fixed. That was to be done by end of March 2000. The possession was to be handed over at the time of execution of the sale deed. The plaintiffs paid the defendant No.1 a sum of Rs.10,000/- on 10/6/2000. A document to that effect was executed between the two. The defendant No.1 was authorised by defendants No.2 and 3 to sell the suit land to the plaintiffs. The defendants No.1 to 3

issued a notice (Exh.103) to the plaintiffs, informing them that the agreement for sale stood cancelled since the plaintiffs failed to get the sale deed executed within a time-frame. The plaintiffs immediately responded to the notice and expressed their readiness and willingness to get the sale deed executed. The plaintiffs immediately filed the suit on 20/1/2001 for specific performance of agreement for sale and consequential relief. They also registered a notice of lis pendence with the office of Sub-Registrar. The defendants No.1 to 3 executed the sale deed (Exh.121) in respect of the suit land in favour of the defendants No.4 and 5. These defendants (appellant herein), therefore, came to be added as party defendants.

3. The trial Court, on appreciation of the evidence, decreed the suit. The first appellate Court confirmed the decree passed by the trial Court.

4. In the memo of this Second Appeal, number of substantial questions of law have been formulated. Learned counsel for the plaintiffs would submit that, it was a concurrent findings of facts. No substantial question of law did arise in the Second Appeal. On hearing both the learned counsel, this Court heard the appeal finally on the following substantial questions of law :-

- (1) Whether the plaintiffs proved to have ever been ready and willing to perform their part of the agreement ?
- (2) Whether the suit was maintainable for want of a prayer for declaration against termination of the agreement for sale ?
- (3) Whether the impugned decree is liable to be set aside for want of framing of necessary points by the appellate Court and appropriate issues by the trial Court ?
- (4) Whether the interference with the exercise of discretion by the trial Court in granting the decree is called for ?

REASONS

5. **Point No.1:-** Section 16(c) of the Specific Relief Act reads :

“16. Personal bars to relief:-

Specific performance of a contract cannot be enforced in favour of a person :-

- (a)
- (b)
- (c) who fails to prove that he has 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 terms the performance of which has been prevented or waived by the defendant.

Explanation : For the purpose of clause (c) :-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court.

(ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.”

Sr.Nos.47 and 48 in Appendix A to the Code of Civil Procedure prescribe forms for suit for specific performance. The relevant clauses of both the forms are reproduced below for ready reference.

No.47

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

No.48

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

6. Learned Senior Counsel for the appellants would submit that, the plaint was not in consonance with Form

No.47 or 48. The plaint is conspicuously silent to aver the plaintiffs to have been ready and willing to perform their part of the agreement. He would further submit that, the plaintiffs ought to have proved that they did have sufficient funds with them on or before March 2000 as per term No.12 of the agreement for sale. The further terms in the agreement would suggest the defendants No.1 to 3 were in dire need of money. The plaintiffs, therefore, ought to have got the sale deed executed by showing their readiness and willingness. When the defendant No.1 was paid Rs.10,000/-, the plaintiffs did not offer to execute the sale deed nor showed that they had sufficient money. The defendants No.1 to 3, in their written statement, have specifically averred the plaintiffs to have had no money to pay them and get the sale deed executed. In the facts and circumstances of the case, the time was essence of the contract. The learned Senior Counsel pointed out 7 occasions on which the plaintiffs ought to have proved to have had sufficient funds with them to perform their part of the agreement. The learned Senior Counsel relied on the following Apex Court judgments to buttress his submissions in this regard.

- (1) Sait Tarajee Khimchand & ors. Vs. Yelamarti Satyam Alias Satteyya & ors. [(1972) 4 SCC 562]

- (2) State Bank of India Vs. Yumnam Gouramani Singh
[(1993) 3 SCC 631]
- (3) Madhukar Nivrutti Jagtap & ors. Vs. Pramilabai
Chandulal Parandekar (Dead) through L.rs. & ors.
[(2020) 15 SCC 731]
- (4) Vijay Kumar & ors. Vs. Om Prakash
[(2019) 17 SCC 429]
- (5) Abdullakoya Haji & ors. Vs. Rubis Tharayil & anr.
[(2019) 17 SCC 216]
- (6) Padmakumari & ors. Vs. Dasayyan & ors.
[(2015) 8 SCC 695]
- (7) Rajasthan State Road Transport Corporation & anr.
Vs. Bajrang Lal [(2014) 4 SCC 693]
- (8) Bandar Singh & ors. Vs. Nihal Singh & ors.
[(2003) 4 SCC 161]
- (9) J. Samuel & ors. Vs. Gattu Mahesh & ors.
[(2012) 2 SCC 300]
- (10) I.S. Sikandar (Dead) by L.Rs. Vs. K. Subramani & ors.
[(2013) 15 SCC 27]
- (11) Sebastiao Luis Fernandes (Dead) through L.Rs. & ors.
Vs. K.V.P. Shastri (Dead) through L.Rs. & ors.
[(2013) 15 SCC 161]
- (12) Malluru Mallappa (Dead) through L.Rs. Vs.
Kuruvathappa & ors. [(2020) 4 SCC 313]
- (13) S. Abdul Khader Vs. Abdul Wajid (Dead) by L.Rs.
& ors. [2008 ALL SCR 2492]

7. Learned Senior Counsel for the appellants would further submit that, the trial Court has simply relied on the oral evidence of the defendant No.4 about financial status of the plaintiffs. There was no documentary evidence in proof of

the plaintiffs to have had financial ability to get the sale deed executed within the time-frame. The burden of proof rests on the plaintiffs. The Courts below, however, wrongly observed the defendants No.1 to 3 to have not put any question to the plaintiff in his cross-examination, disputing the plaintiffs' financial status. According to learned Senior Counsel, the trial Court ignored the documentary evidence on record. The terms of the agreement did not speak of the defendants to have their land measured. In spite of the same, the defendants No.1 to 3 preferred application Exh.114, dated 4/1/2000 to Taluka Inspector of Land Records (T.I.L.R.) for measurement. A sum of Rs.3000/- was paid towards measurement charges. Attention of this Court was drawn to Exh.115, a Challan indicating the deposit of the amount in the Government Treasury. Further documents Exh.116 to 119 were relied on to suggest the additional sum of Rs.500/- was deposited towards further charges for measurement. Notices were issued by the T.I.L.R. to all the concerned regarding his visit to the land for measurement of the same have also been relied on.

8. The learned Senior Counsel would further submit that, the defendant No.1 has specifically deposed that the plaintiffs have their land adjoining the suit land. Bushes and

acacia trees have been grown therein. The plaintiffs wanted to have their land measured along with the suit land. The plaintiffs did not co-operate. They did not deposit measurement charges. The plaintiffs allowed to pass the time fixed for performance in terms of the agreement of sale. The learned Senior Counsel would further submit that, the finding recorded by the trial Court, in ignorance of the evidence on record, was perverse one. The first appellate Court committed the same mistake. It did not look into the pleadings and evidence. The oral evidence of defendant No.1 was specifically adverted to. The questions put to the plaintiff in his cross-examination and answers elicited have also been adverted to. The learned Senior Counsel would submit that, the findings recorded by both the Courts below, holding the plaintiffs to have been ready and willing to perform their part of the agreement were liable to be set aside.

9. The learned counsel for the plaintiffs would, on the other hand, submit that, there was evidence to indicate the plaintiffs to have been men of means. The admission given by the appellants herein (defendants No.4 and 5) would bind the defendants No.1 to 3. He would further submit that, the plaintiffs have produced on record documentary evidence in proof of their financial status. It was in the nature of Bank

Pass Book and statements of accounts. The trial Court inadvertently did not mark those documents with Exhibit Numbers. According to the learned counsel, it was a case of performance of reciprocal promises, unless and until the defendants No.1 to 3 get the land measured and boundaries fixed, the plaintiffs were not supposed to perform part of their reciprocal promise. According to the learned counsel, both the Courts have given the findings on this point consistent with the evidence on record.

10. Mr. Kulkarni, learned counsel for respondents No.1 to 4 relied on the following authorities :

- (1) Nathulal Vs. Phoolchand [AIR 1970 SC 546]
- (2) Sughar Singh Vs. Hari Singh (Dead) through L.Rs. & ors. [AIR 2021 SC 5581]
- (3) Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar & ors. [AIR 1999 SC 2213]
- (4) P. D'Souza Vs. Shondrilo Naidu [2004(4) Ah.L.J. 802]
- (5) Balasaheb Dayandeo Naik (Dead) through L.Rs. & ors. Vs. Appasaheb Dattatraya Pawar [AIR 2008 SC 1205]
- (6) A. Kanthamani Vs. Nasreen Ahmed [AIR 2017 SC 1236]

11. In Vijay Kumar's case (supra), it has been observed :-

“Readiness and willingness of purchaser to perform his part of contract – Court has to examine capacity of purchaser to pay amount of sale consideration, at the time/ date(s) envisaged in the agreement of sale – Specific performance cannot be decreed on basis that purchaser would deposit the balance amount of consideration after such suit is decreed, when purchaser was unable to establish its capacity to pay balance consideration as per the terms of the agreement of sale – Evidence to be produced by purchaser to establish its capacity to pay sale consideration.”

12. In Abdullakoya’s case (supra), it has been observed :-

“Readiness and willingness to perform – Inference of – Financial capacity – Possessing financial capacity to pay balance consideration, held, must be established not only on agreed date but also : (i) when demand notice was issued, and (ii) on date of filing of suit – Temporary arrangement made on agreed date alone cannot be treated as financial capacity to complete transaction – Adducing proof of availability of funds even if amount was not insisted upon in Court – Necessity of – Plaintiff-vendee executing further agreement to sell suit properties to third parties even prior to execution of sale deed in his favour – Relevant fact to ascertain his intention – On facts, held, plaintiff failed to establish readiness and willingness for granting specific relief – Order of refund of earnest money with interest, affirmed.”

Paragraphs No.4, 8, 10, 12, 14, 20, 22, 23 of the said judgment were relied on. This Court has carefully perused the aforesaid authorities.

13. While in case of J. Samuel (supra), it has been observed in paragraph No.14 :-

“14. Before proceeding further, it is also useful to refer to Section 16(c) of the Specific Relief Act which reads as under :

“16. Personal bars to relief.-- Specific performance of a contract cannot be enforced in favour of a person—

(a) – (b) * * *

(c) who fails to aver and prove that he has 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 terms the performance of which has been prevented or waived by the defendant.

Explanation :- For the purposes of clause (c).--

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court.

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

It is clear that in a suit for specific performance of a contract, unless there is a specific averment that he has performed or has always been ready and willing to perform the essential terms of the contract, the suit filed by him is liable to be dismissed. In other words, in the absence of the abovesaid claim that he is always ready and willing to perform his part of the

contract, the decree for specific performance cannot be granted by the Court.”

14. Keeping on mind the observations made in the judgments relied on, the Court has to advert to the pleadings and evidence in the case to find whether the finding recorded on this issue is perverse and therefore, liable to be set aside.

15. It has been specifically averred in paragraph no.2 of the plaint that the plaintiffs replied the defendants No.1 to 3's notice on 15/11/2000 and informed them their readiness and willingness to get the sale deed executed. It has further been averred that the plaintiffs were ready to perform their part of the agreement and pay the balance consideration amount. Still, the defendants refused to execute the sale deed. For better appreciation, the relevant pleadings are reproduced below :

"प्रतिवादींनी करारभंग करण्याचे हेतूने वादींना ता . ९/११/२००० रोजी नोटीस करून खोट्या तक्रारी केल्या. त्या नोटिसीस वादींनी ता. १५/११/२००० रोजी उत्तर देऊन प्रतिवादी यांचे कडे करार पूर्तीची व करारानुसार राहिलेली रक्कम घेऊन कायम खरेदी खत लिहून नोंदवून देण्याचे मान्य केले. वादी हे करारानुसार वर्तन करण्यास तयार असतांना तसेच राहिलेली रक्कम रु. ६,९०,०००/- प्रतिवादींना देण्यास तयार असतांना प्रतिवादींनी वादींना दावा मिळकतीचे कायम खरेदीखत लिहून नोंदवून देणास नकार दिला. कराराप्रमाणे वर्तन करण्याचे अमान्य केले . वादी

करारानुसार रक्कम देण्यास तयार असतांना प्रतिवादींनी जमिनीची तालुका इन्स्पेक्टर ऑफ लॅन्ड रेकॉर्ड्स, कोपरगाव मार्फत मोजणी करून क्षेत्र निश्चित करून दिले नाही. प्रतिवादींनी वादी यांचे कडून राहिलेली रक्कम रु .६,९०,०००/- घेऊन वादींना दावा मिळकतीचा मालकी हक्काने प्रत्यक्ष कबजा द्यावा व कायम खरेदी खत लिहून नोंदवून द्यावे, म्हणून वादींचा दावा आहे.”

16. The plaintiff, in his oral evidence, reiterated the averments in the plaint. He testified to have placed on record documentary evidence in proof of his financial status. Those documents appear to have not been admitted in evidence (not marked with Exhibit Numbers). Those documents, therefore, could not be looked into in support of the claim of the plaintiffs. The defendant No.4 (appellant herein) claims through defendants No.1 to 3, who were the original owners of the suit land. He admitted in no uncertain terms that the plaintiffs are financially rich. They are businessmen. They have various shops at Kopergaon. Construction is one of the businesses of the plaintiffs. The oral evidence of the plaintiffs, coupled with the admission given by the defendant No.4 go a long way to confirm the findings recorded by both the Courts below that the plaintiffs were financially sound to have the sale deed executed in their favour.

17. It is true, clause 3 of the agreement does suggest that the defendants No.1 to 3 had a financial problem. They had no option but to sell the suit land. Clause 12 of the agreement suggests that the sale deed was to be executed by March 2000. Recitals of clause 14 of the agreement are to the effect that the suit land was to be measured by T.I.L.R. Its boundaries were to be got fixed. Then possession of the suit land was to be delivered. If the area of the land to be sold was discovered to be less or more, the amount of consideration was to be varied accordingly.

18. When as per the terms of the agreement for sale the sale deed was to be executed by March 2000, the defendant No.2 executed one more document in favour of the plaintiffs on 10/6/2000. It was titled as "acknowledgment receipt" (पावती) (Exh.100). Under the said document, the defendants No.1 to 3 received a sum of Rs.10,000/- over and above the amount of earnest money received under the agreement for sale. These defendants admitted therein that the sale deed could not be executed by both of them on account of defendant No.1's some difficulty. The clause in agreement for sale that the sale deed was to be executed within a time-frame was, therefore, waived. Again for better

appreciation, the relevant recitals of Exh.100 are reproduced below :-

"तुमचे आमचे विचारे खरेदीखत मार्च २००० पावेतो करावयाचे होते . मात्र माझे काही अडचणीमुळे हा व्यवहार पूर्ण होऊ शकला नाही . त्यामुळे ती अट सोडून दिली आहे . आज रोजी तुम्ही माझे मागणीप्रमाणे रु .१०,०००/- मला रोख दिले आहेत . आता तुमचेकडून घेणे बाकी रु .६,९०,०००/- फक्त राहिली आहे . अक्षरी रु. सहा लाख नव्वद हजार फक्त राहिले आहेत .

खरेदीखत तुमचे आमचे विचारे करावयाचे ठरले आहे . मी तुम्ही सांगाल त्यावेळी खरेदीखत लिहून नोंदवून देईन. तक्रार करणार नाही.

करिता ही पावती स्वतः करिता व नं .२ व ३ चे जनरल मुखत्यार म्हणून लिहून दिली असे."

Needless to mention that, in case of contract for sale of immovable property, time is not to be considered essence of contract unless the same is specifically spelt out by the terms. The subsequent document (Exh.100) would prevail over the relevant terms in the original agreement for sale.

19. In case of P. D'Souza (supra), the Apex Court observed :-

"The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of

him to be done in terms of the agreement for sale.”

20. It is true that, there is voluminous evidence on record to indicate the defendant No.1 to have had moved an application to the T.I.L.R. for measurement of the suit land. He paid necessary measurement charges twice. The T.I.L.R., in turn, issued notice/s to all the concerned including the plaintiffs, calling upon them to remain present at the land for measurement. It is the case of the defendants No.1 to 3 that the plaintiffs have their land adjoining the suit land. The plaintiffs wanted to have it measured along with the suit land. The plaintiffs did not co-operate. The Surveyor had asked the plaintiffs to get the acacia trees and bushes removed from their own land. The defendants might be true in their contention. The trial Court, however, has not accepted the defendants’ case for want of examination of the Surveyor. The said findings cannot be termed to be perverse, because in the application (Exh.114) moved by the defendant No.1 to the T.I.L.R., it has been specifically mentioned that, the consent letter of the adjoining owners was submitted along with the said application. The same has to be taken to infer the plaintiffs’ being adjoining land owners gave their nod for the

measurement of the suit land. There is also evidence to indicate that there was intervening Bandh, separating the suit land and the land of the plaintiffs. The findings recorded by the trial Court and confirmed by first appellate Court, therefore, cannot be found fault with.

21. **Point No.2** :- The learned Senior Counsel for the appellants would submit that, admittedly, the defendants No.1 to 3, by notice dated 19/11/2000 (Exh.103), informed the plaintiffs to have cancelled the agreement on account of the plaintiffs' failure to get the conveyance executed in compliance with the terms of the agreement for sale. It was also informed the amount paid towards earnest money stood forfeited.

The learned Senior Counsel for the appellants adverted this Court's attention to the prayer clause in the plaint to submit that, there is no prayer for setting aside the termination of the agreement for sale. In support of his submissions, the learned Senior Counsel has placed strong reliance on the judgment of the Apex Court in case of I.S. Sikandar (supra), in which the Apex Court held :-

“Suit for specific performance– Maintainability– Subsistence of contract essential precondition – Plaintiff having failed to perform his part of the agreement, agreement already terminated by defendant vendor – In absence of plaintiff’s prayer seeking declaratory relief that termination of agreement was bad in law, held, suit for specific performance not maintainable.”

22. This Court was also taken through paragraphs No.31 to 33, 35, 37 and 40 of the said judgment to submit that, similar issue was raised for the first time before the Apex Court. According to learned Senior Counsel, for want of such a prayer in the plaint, the suit was not maintainable and was, therefore, liable to be dismissed.

23. Admittedly, no issue of maintainability of the suit for want of prayer for setting aside termination of agreement for sale was raised in the written statement. Neither the trial Court nor the first appellate Court were called upon to address the same. In the memo of this Second Appeal, the said ground of challenge has not been raised.

24. From the pleadings and evidence on record, it could be found that, action on the part of defendants No.1 to 3 in terminating the agreement for sale was unilateral one. The facts in I.S. Sikandar’s case would demonstrate that, there was an agreement of sale executed by defendants No.1

to 4, dated 25/12/1983 in favour of the plaintiff, agreeing to sell the scheduled property in his favour for certain consideration amount. As per clause 6 of the agreement of sale, the time to get the sale deed executed was specified as five months, after obtaining necessary permission from the competent authority under Urban Land Ceiling Act. In case of any delay in obtaining such permission, the time for due performance of agreement was to stand further extended for a period of two months. The permission from the authorities was not obtained by the defendants. The period of five months stipulated under clause 6 of the agreement expired. In spite of the same, the defendants No.1 to 4 got issued the notice to the plaintiff, pointing out that, he failed to perform his part of the contractual terms of the agreement by not paying the balance consideration to them and get the sale deed executed. The plaintiffs were called upon to pay the balance sale consideration and get the sale deed executed on or before 18/3/1985. In reply to the said notice, the plaintiff admitted his default in performing his part of contract and prayed time till 23/5/1985 to get the sale deed executed in his favour. The defendants again issued a notice dated 28/3/1985, extending the time to the plaintiff, asking him to pay the sale consideration amount and get the sale deed

executed on or before 10/4/1985 and on failure to comply with the same, the agreement of sale dated 25/12/1983 would be terminated since the plaintiff did not avail of the time extended to him.

So is not the case herein. The time-frame for execution of the sale deed mentioned in the agreement for sale was relaxed/ waived by the subsequent document, titled as “acknowledgment receipt” (पावती) (Exh.100). Here, the defendants, without calling upon the plaintiffs to comply with their part of the contract and get the sale deed executed, unilaterally terminated the agreement for sale. It has, therefore, to be observed that, the observations made by the Apex Court in I.S. Sikandar’s case were based on the facts and circumstances obtainable therein.

25. In case of A. Kanthamani (supra), the Apex Court observed in paragraph No.39 of the judgment as under :

“39. . . ., the decision relied on by the learned counsel for the Appellant in the case of I.S. Sikander (supra) turns on the facts involved therein and is thus distinguishable.”

26. In view of this Court, failure to raise the issue of maintainability of the suit in the written statement, and

raising the same before this Court for the first time during oral submissions without making a ground in the memo of the Second Appeal, the appellants could not be heard to say the suit was not maintainable for want of prayer for setting aside termination of the agreement for sale. It is reiterated that, the facts of the present case are altogether different than the facts in I.S. Sikandar's case.

27. **Point No.3 :**

The trial Court framed the following issues :

- (1) Do plaintiffs prove that they were and are ready and willing to perform their part of contract ?
- (2) Whether the sale transaction of suit land dt. 22/1/01 between defendant nos.1 to 3 and 4 & 5 is hit by doctrine of lis pendense ?
- (3) Whether plaintiffs are entitled for decree of specific performance of agreement ?
- (4) To which reliefs plaintiffs are entitled ?

While the points framed by the first appellate Court are as under :

- (1) Whether it is proved that the trial Court has not properly appreciated the evidence on record ?

- (2) Whether the findings of the trial Court are erroneous?
- (3) Whether the impugned judgment and decree passed by the trial Court calls for any interference ?

28. In case of Mulluru Mallappa (supra), The Apex Court has observed :-

“The judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons. Even when the first appellate Court affirms the judgment of the trial court, it is required to comply with the requirement of Order 41 Rule 31 and non-observance of this requirement leads to infirmity in the judgment of the first appellate court. No doubt, when the appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by the trial court. Expression of a general agreement with the reasons given by the trial court would ordinarily suffice.”

29. True, the first appellate Court did not frame the necessary points in so many words. The trial Court has also not framed an issue as regards the defendants No.4 and 5's case of being bonafide purchasers for value without notice of the plaintiffs' right. Close scrutiny of the trial Court's judgment and that of the first appellate Court would, however, undoubtedly indicate that, all the grounds raised in the suit

have been considered and addressed to, including the issue of claim of being bonafide purchasers.

30. Section 19(b) of the Specific Relief Act reads :-

“19. Relief against parties and persons claiming under them by subsequent title :-

Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against:--

(a)

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.”

31. The agreement for sale (Exh.99) was registered with the office of Sub-Registrar on the day on which it was executed.

Section 3 of Transfer of Property Act, 1882 reads :

A person is said to have notice of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation 1.— Where any transaction relating to immovable property is required by law to be and

has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, 2 where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

32. Admittedly, the appellants (subsequent purchasers) did not take search in the office of the Sub-Registrar to verify title of the vendors (defendants No.1 to 3). They did not make any enquiry as to whether there was any charge on the suit land. Had the appellants (defendants No.4 and 5) taken search, they would have come across the factum of registration of agreement for sale between the plaintiffs and defendants No.1 to 3. No sooner the suit was filed, the plaintiffs also registered a notice of lis pendence. Admittedly, the sale deed executed by defendants No.1 to 3 in favour of the plaintiffs is post institution of the suit and even registration of notice of lis pendence. The trial Court has, therefore, rightly observed that the transaction of sale was hit by the principle of lis pendence.

33. It was the case of the appellants (defendants No.4 and 5) that the sale deed was executed pursuant to the agreement for sale entered into between them and the defendants No.1 to 3 before the agreement for sale in question was executed. The written statement is conspicuously silent to give the date of agreement of sale executed between them. It is true that, there is passing reference in the written statement, suggesting the sale deed was executed pursuant to some agreement for sale. In the sale deed (Exh.121), we find reference to such agreement for sale. The question was, whether it was a genuine document. The same was admitted in evidence vide Exh.122, in view of the oral testimony of defendant No.4 and attesting witnesses to the said agreement.

Admittedly, the said agreement was executed on a plain paper. Two revenue stamps came to be affixed thereon. The document is shown to have been executed on 1/3/1999 (Exh.122). In the said document of sale, possession of the suit land was said to have been delivered on the very day of the agreement for sale. The defendant No.1, however, admitted in his evidence that he was in possession of the suit land on the day of institution of the suit. If really the

possession of the suit land was handed over by the defendants No.1 to 3 to the appellants herein on the day the agreement for sale was executed on 1/3/1999, then how could they (defendants No.1 to 3) be heard to say that they were intending to sell the suit land to the plaintiffs on getting it measured. The trial Court has found it to be an interesting fact that the sale consideration mentioned in the agreement dated 1/3/1999 is Rs.8,11,000/-. Whereas the amount of consideration mentioned in the agreement for sale for the enforcement of which this suit is filed, is Rs.7,51,000/-. The trial Court has rightly observed, as to how cum the vendor who agreed to sell the suit land for Rs.8,11,000/-, would agree to receive the consideration amount lesser than the one mentioned in the agreement (Exh.122). True, a public notice was shown to have been issued at the instance of the appellants before the sale deed was executed. It was published in a weekly, published from Kopargaon itself. The trial Court, on appreciation of the evidence in the case, has rightly observed the agreement (Exh.122) to have been anti-dated and executed only with a view to defeat the plaintiff's right under the agreement for sale dated 31/12/1999. This Court finds no reason to take a different view on reappraisal of the evidence in the suit. As such, the trial

Court has rightly held the sale deed to have been hit by the principle of lis pendence. The appellants could not be said to have been bonafide purchasers for value without notice of the original contract. Non-framing of issues in that regard proves to be inconsequential since the same has been addressed with sound reasons.

34. **Point No.4** :- It was submitted by the learned Senior Counsel for the appellants that, the appellants have improved the suit land by spending a lot. They have been in possession of the suit land for over ten years. The trial Court, therefore, ought not to have exercised discretion in favour of the plaintiffs.

This Court is not in agreement with the submissions made on behalf of the appellants. The appellants are not bonafide purchasers. The transaction is hit by lis pendence. There is evidence to indicate the appellants to have been in the know of the earlier transaction between the plaintiffs and defendants No.1 to 3. All are local persons. On the day the suit was filed, an application for temporary injunction was being argued by learned Advocate for the plaintiffs. There was an appearance on behalf of the defendants No.1 to 3 on caveat. Still, the sale deed came to

be executed two days thereafter. The execution of agreement (Exh.122) could be termed to be nothing short of a fraudulent transaction entered into only with a view to defeat the rights of the plaintiffs. Had it been a case of hardship of original defendants No.1 to 3, it would have been alright to interfere with grant of discretionary relief in favour of the plaintiffs.

35. For all aforesaid reasons, the substantial questions of law are answered accordingly. This Court finds no merit in any of the questions raised in this Second Appeal. The appeal thus fails. The same is dismissed. Consequently, Civil Applications are also dismissed.

(R. G. AVACHAT, J.)

After pronouncement of judgment, learned counsel for the appellants prayed for continuation of the interim relief for a period of eight weeks. In the interest of justice, interim relief granted earlier to continue for a period of eight weeks.

(R. G. AVACHAT, J.)

fmp/-