

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.113 OF 2020
WITH
CIVIL APPLICATION NO. 104 OF 2020
IN
SECOND APPEAL NO. 113 OF 2020**

1. Haridas Vishnu Sawant .. Appellants
Aged 50 yrs, Occ.Agri, residing at
Kalambi, Tal.Khatav, Dist. Satara
2. Bhanudas Bajirao Jadhav, since
dec. thru his Legal heirs
- 2A Kumudini Bhanudas Jadhav,
residing at Yeliv, Tal. Khatav,
Dist.Satara,

Versus

- 1 Sou.Nalini Satish Jadhav .. Respondent
Aged 32 yrs, Occ.Household
- 2 Satish Dhanaji Jadhav
Aged 38 yrs, Occ. Agri
Residing at Yeliv, Tal.Khatav
Dist. Satara.

...

Mr. Dilip Bodake with Sharad Bhosale for the appellants.
Mr.Sachin S. Punde for the respondent.

**CORAM: BHARATI DANGRE, J.
DATED : 8th APRIL 2022.**

JUDGMENT :-

1 The appellants in this Appeal are the defendants in the Regular Civil Suit No.350 of 2001 filed by the plaintiff, specific performance of agreement of sale dated 14/6/2001 in respect of the property belonging to the defendant and which is alleged to have been agreed to be sold to the plaintiff for a consideration of Rs.70,000/-.

 The Suit came to be decreed with costs and the defendants were directed to execute the sale transaction in favour of the plaintiff by accepting the amount of Rs.59,000/- and perform his part of the contract. On the failure of the defendant no.1 to execute the sale transaction, liberty was given to the plaintiff to get the same executed through the Court.

2 Being aggrieved by judgment dated 10/3/2011, decreeing the Suit of the plaintiff, the defendants preferred Regular Civil Appeal No.38/2011 which was also dismissed by judgment dated 22/10/2018 at the hands of the District Judge-1 Vadunj.

 Being aggrieved, the present Second Appeal is instituted by the said appellants.

3 I have heard Shri Dilip Bodake for the appellant/original defendant and Advocate Sachin Punde for the respondent in the Appeal and original plaintiff.

4 The suit property is a parcel of land located in Mauje Yeoul, Taluka Khatav and the defendant, who agreed to sell, his 5 anna 4 pai share to the plaintiff resulted in execution of agreement of sale on 14/6/2001 for a consideration of Rs.70,000/-. The plaintiff paid earnest money of Rs.11,000/- to the defendant no.1 and agreed to pay the balance within three months of the agreement of sale. The agreement being unregistered, the plaintiff pleaded that the possession of land was delivered to him on the same day and the defendant was to incur expenses of the sale deed. The plaintiff particularly pleaded that, on 2/7/2001, the plaintiff paid further sum of Rs.20,000/- to the defendant no.1 and he was ready and willing to execute the sale transaction by paying remaining amount of Rs.59,000/-. In order to convey his readiness and willingness, he send a notice to the defendant no.1 on 3/8/2001 by Registered Post, extending his willingness to get the agreement executed and requesting the defendant no.1 to execute the transaction as per the agreement for sale. Accordingly, the plaintiff remained present in the Registrar's office on 13/9/2001 from 11.00 am, but despite notice being served upon the defendant no.1 on 5/9/2001, he failed to remain present and avoided to execute the transaction as per the terms and conditions to sell.

 The plaintiff claimed to have incurred an amount of Rs.15,000/- to Rs.20,000/- towards expenses in developing the suit land and in order to restrain the plaintiff from enjoying the

fruits of the property, the defendant no.1 sold the suit land to one Shri Bhanudas Jadhav, thereupon the plaintiff amended the suit and impleaded him as defendant no.2.

In the backdrop of the above pleadings, the plaintiff sought specific performance of the contract and a declaration, directing defendant no.1, to execute the sale transaction in favour of the plaintiff.

5 Both the defendants, to the Suit resisted the relief by filing their respective written statement at Exhibit 36 and 37 respectively.

The defendant no.1 denied the execution of agreement of sale in favour of the plaintiff and he also denied acceptance of earnest money as well as acceptance of Rs.20,000/-. He further denied to the delivery of possession, in view of the agreement of sale. By amending his pleading, defendant no.1 specifically pleaded alternatively, that if the Court comes to a conclusion regarding the agreement of sale dated 14/6/2001, since it was an unregistered agreement, coupled with possession and in terms of the said agreement, the plaintiff was liable to pay an amount of Rs.59,000/- within three months and to get the sale transaction executed. However, since the plaintiff failed to pay the requisite amount during the prescribed period of three months and since defendant no.1 was in need of money due to illness of his mother and he had to repay the amount of

household expenses, and since there was a failure on part of the plaintiff to pay the remaining amount, his right of specific performance is extinguished because time was the essence of contract. The defendant no.1 thus alleged that the plaintiff is responsible for breach of conditions of the Agreement, which prompted him, to sell the suit land to defendant no.2.

The defendant no.2 also opposed the claim of the plaintiff, on the basis, that he had purchased the suit land on 15/9/2001 for a consideration of Rs.91,000/- from defendant no.1 and before execution of the sale transaction, he had verified the mutation entries, and found that the name of the defendant no.1 recorded in the ownership as well as possession column. He, therefore, claimed that he is a bonafide purchaser without notice of the transaction between the plaintiff and defendant no.1. He claimed to be the exclusive owner of suit land on the basis of sale deed dated 15/9/2001.

6 In the wake of the aforesaid facts involved, the trial Court framed 13 issues and the burden to prove the execution of the agreement dated 14/6/2001 and receipt of earnest money as well as handing over of the possession of the suit property on the very same date, was cast on the plaintiff. The defendant no.1 was shouldered with burden to prove, whether time was the essence of the contract and whether the Suit is hit by provisions of Consolidation Act. Burden of proving that he is a bonafide purchaser for value without notice, was cast on defendant no.2.

Further, the burden to prove readiness and willingness to pay an amount of Rs.59,000/- was also cast upon the plaintiff.

7 In support of the claim, the plaintiff examined himself (Exhibit-50) and one more witness, Suhas Hattigote, scribe of the written agreement (Exhibit-67). The defendant no.1 examined himself along with defendant no.2, the bonafide purchaser of the suit property.

By appreciating the evidence placed before him, the learned Civil Judge, Sr. Division, Vadunj, accepted the case of the plaintiff as pleaded, that the defendant delivered the possession of the suit land on the day of agreement of sale. The witness of the plaintiff deposed that both the parties were present before him when the document was executed and that defendant no.1 put his signature in presence of the witnesses.

Accepting the aforesaid evidence brought on record by the plaintiff, the trial Court held that execution of agreement dated 14/6/2001 is proved. The payment of earnest money of Rs.11,000/- was also held to be proved by the witness of the plaintiff and particularly, when during the argument, the counsel on behalf of defendant no.1 fairly admitted the execution of the agreement as well as payment of earnest amount of Rs.11,000/-.

8 Coming to the third issue which was framed for determination, as to whether the plaintiff was handed over the possession of the suit property on 14/6/2001. Recording that,

except the recitals of the agreement for sale, there was no evidence on record to support the factum of the plaintiff's possession over the suit land and particularly when 7/12 extract of the land continue to record the name of the defendant no.1, the said issue was answered in the negative, and also the issue about the subsequent payment of Rs.20,000/- made by the plaintiff to the defendant. The burden cast on the defendant no.1 as to whether time was essence of contract, was also answered in the negative.

9 As far as the issue about readiness and willingness of the plaintiff, the trial Court referred to the notice sent by the plaintiff to the defendant before expiry of period of three months, as stipulated in the agreement for sale, calling upon him to accept the amount of Rs.59,000/- and to execute the sale deed. Holding that this notice support the plaintiff's claim that he is ready and willing to perform his part of the contract, the learned Judge focused his attention on the conduct of the defendant from his cross-examination, since he denied the execution of the agreement, though on receipt of the notice, on 5/9/2001, he forwarded a reply to the plaintiff on 11/9/2001. Recording that as per the agreement dated 14/6/2001, period of three months was over on 14/9/2001, and on 15/9/2001, the defendant no.1 executed a sale deed of the suit land in favour of defendant no.2 which was inferred as, the defendant no.1 avoided to perform his part of the contract. The action of the defendant no.1 to execute the transaction immediately on completion of period of three

months, was held to be a deceitful act, giving rise to an inference that he was only waiting for expiry of three months, as a technical point. Referring to the document in form of sale transaction with defendant no.2, for consideration of Rs.91,000/-, the trial Court has recorded, that the amount was paid to defendant no.1 by defendant no.2 prior to execution of sale transaction and not in presence of the Registrar, which reflected the hurried approach of the defendant no.1, so as to avoid the transaction with the plaintiff. The plaintiff's readiness and willingness being proved, he was held eligible for a decree of specific performance.

Recording that the plaintiff is entitled for a relief for specific performance in the wake of the circumstances brought on record and supporting his case, the Suit came to be decreed and the plaintiff was directed to deposit an amount of Rs.59,000/- in the Court within one month and defendant no.1 was directed to execute sale transaction in his favour and perform his part of the contract.

10 On an Appeal being filed by the defendants, the Appellate Court upheld the findings of the trial Court, on reading of the recitals in the deed of agreement of sale, in light of the evidence of the plaintiffs and defendants in respect of proof of execution of the said agreement of sale dated 14/6/2001. The said fact is held to be substantiated by the evidence brought on record, particularly in the cross-examination of the defendant no.1, that at the time of execution of sale deed, plaintiff has given

him earnest amount of Rs.11,000/-. Recording that the trial court is right in holding that the defendant no.1 agreed to sell the suit property for consideration of Rs.70,000/- to the plaintiff on the basis of agreement to sell dated 14/6/2001 and accepting the earnest money, though the subsequent payment of Rs.20,000/- is not held to be proved, the Appeal is dismissed.

11 As far as the effect of an unregistered agreement on which the plaintiff has relied, to establish transfer of possession to the plaintiff, on the very same day, and while dealing with the submission of the appellant in the Appeal which is also vehemently sought to be advanced before me by the learned counsel Dilip Bodake that the unregistered document cannot be read in evidence, reliance was placed upon decision of the Apex Court in case of Omprakash Vs. Laxminarayan & Ors, (2014) 1 SCC as well as judgment in case of Javer Chand and ors. Vs. Pukhraj Surana, AIR 1961 SC 1655. The Appellate Court recorded that insufficiently stamped document is distinguishable from a non-registered document and it referred to the effect of the said documents while concurring with the trial Court in its finding upon readiness and willingness on part of the plaintiff, but blamed the defendant no.1 who was avoided execution of the sale transaction.

12 The question that arises for determination, is whether the agreement to sell which contain a recital about delivery of possession to the plaintiff could be accepted as the evidence of the

possession being made over to the plaintiff, in absence of the said document being registered and when registration is mandatory, as from reading of Section 17 of the Registration Act, 1908.

17 Documents of which registration is compulsory : (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act 16 of 1864, or the Indian Registration act, 1877 (3 of 1877), or this Act came or comes into force, namely –

(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53-A”.

However, Section 49 of the Registration Act, 1908 deal with effect of non-registration of document, required to be compulsorily registered, which read thus :-

“49. Effect of non-registration of documents required to be registered – No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall –

- (a) affect any immovable property comprised therein,
or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power.

13 The Hon'ble Apex Court in case of Ameer Minhaj vs Dierdre Elizabeth (Wright) Issar 2018 (7) SCC 639, was confronted with the effect of a document which is unregistered and whether it could be admitted as evidence of a contract, in Suit for specific performance, wherein it made the following observation :-

“12. In the reported decision, this Court has adverted to the principles delineated in K.B. Saha & Sons (P) Ltd. v. Development Consultant Ltd. and has added one more principle thereto that a document is required to be registered, but if unregistered, can still be admitted as evidence of a contract in a suit for specific performance. In view of this exposition, the conclusion recorded by the High Court in the impugned judgment that the sale agreement dated 9-7-2003 is inadmissible in evidence, will have to be understood to mean that the document though exhibited, will bear an endorsement that it is admissible only as evidence of the agreement to sell under the proviso to Section 49 of the 1908 Act and shall not have any effect for the purposes of Section 53-A of the 1882 Act. In that, it is received as evidence of a contract in a suit for specific performance and nothing more. The genuineness, validity and binding nature of the document or the fact that it is hit by the provisions of the 1882 Act or the 1899 Act, as the case may be, will have to be adjudicated at the appropriate stage as noted by the trial court after the parties adduce oral and documentary evidence”.

14 The issue that arises in the Appeal as against the concurrent finding rendered against the appellant by the two Courts below, being answered to the above effect in the wake of proviso appended to Section 49 of the Specific Relief Act, and the aforesaid position being rightly appreciated by the Appellate Court, the Appeal do not give rise to the said substantial question of law.

15 As far as the readiness and willingness of the plaintiff is concerned, the learned counsel Mr.Dilip Bodake has placed reliance on the decision of the Apex Court in Sukhwinder Singh Vs. Jagroop Singh and Anr, AIR 2020 (SC) 4865, and in particular, the following observations of the Apex Court in the said lower Court.

“9. The suit being the one for specific performance of the contract on payment of the balance sale consideration, the readiness and willingness was required to be proved by the plaintiff and was to be considered by the Courts below as a basic requirement if a decree for specific performance is to be granted. In the instant case though the defendant No.2 had denied the agreement as also the receipt of the earnest money, the same would not be of consequence as the agreement claimed by the plaintiff is with the defendant No.1 and the contention of the defendant No.2 to deny the same is without personal knowledge on that aspect. However, even in the absence of the defence put forth, the plaintiff was required to prove his readiness and willingness and that aspect of the matter was to be considered by the Courts below. In the present case though the plaintiff examined himself as PW1, as also PW2 and PW3, the document writer, and the witness to

the agreement who stated with regard to the execution of the agreement, the evidence to prove the readiness and willingness with regard to the resources to pay the balance sale consideration is insufficient. In the absence of denial by the defendant No.1, even if the payment of Rs.69,500/ and the claim by the plaintiff of having gone to the office of Sub-Registrar on 15.06.2004 is accepted, the fact as to whether the plaintiff had notified the defendant No.1 about he being ready with the balance sale consideration and calling upon the plaintiff to appear before the Sub-Registrar and execute the Sale Deed was required to be proved. From among the documents produced and marked as Exhibit P1 to P9 there is no document to that effect, more particularly to indicate the availability of the balance sale consideration as on 15.06.2004 and as on the date of filing the suit. Despite the same, merely based on the oral testimony of PW1, the Courts below have accepted the case put forth by the plaintiff to be ready and willing to complete the transaction.

The above observation distinguishable in wake of it's applicability, since the facts involved an agricultural land, which was purchased by virtue of registered sale deed by 110 persons for construction of their house, the plaintiff being one of them, it was converted into non-agricultural use and lay out was drawn at subsequent point of time. One of the plot was allotted to the plaintiff and another plot was allotted to defendant no.2. The plaintiff contended that the defendant no.2 had no right, title or interest in the plot of the plaintiff i.e. plaintiff no.1, but he erected a hut and lived there for some days and allowed defendant no.1 to occupy the same. It is in the backdrop of these facts the

provisions of Section 49 was sought to be invoked. The suit was therefore, filed by the plaintiff calling upon the defendants to restore his possession.

It is in the backdrop of these facts, the unregistered sale deed was construed and held that since the document in form of *Kararnama* between the plaintiff and the husband of the defendant no.1 executed on 30/11/1956 when the defendant no.1 combated the claim of the plaintiff, by contending that her husband Fulchand became the owner of plot no.1 and she had purchased the said plot from him by virtue to *Kararnama* and she was delivered the possession of the suit plot along with the hut to her on the same day and that is how she is in continuous possession and since she also pleaded that she had perfected her title by adverse possession. The observations of the learned Judge as regards the effect of non-registration of the said deed and its admission in evidence even for co-lateral purpose, would therefore, have to be read restricted to the facts involved.

15 Another point raised by Mr.Bodake in the Second Appeal is about the readiness and willingness on part of the plaintiff to perform his part of the contract.

Careful perusal of the concurrent finding rendered, would reveal that, the plaintiff had issued notice before expiry of period of three months within which the agreement was to be executed, asking the defendant to execute the sale deed in the

office of Registrar by remaining present on 13/9/2021. The defendant failed to attend the office for executing the sale deed and while responding to the notice, the defendant denied that there was no question of remaining present in the Registrar's office. The evidence brought on record is to the effect that the plaintiff sent a notice on 30.8.2001 to the defendant, calling upon him to accept the amount of Rs.59,000/- and to execute the sale transaction. This established the readiness and willingness on part of the plaintiff to perform his part of the contract and the Courts below have rightly construed, it to be sufficient compliance of Section 16 and rather commented upon the conduct of the defendant, who immediately on the next date, on expiry of three months, i.e. 14/9/2001, executed a sale transaction in favour of defendant no.2 on 15/9/2001. This conduct has been construed as attempt on part of defendant no.1 to avoid to perform his part of the contract.

16 To succeed in a Suit for Specific Performance, the plaintiff has to prove (a) that a valid agreement of sale was entered by the Defendant in his favour and the terms thereof; (b) that the defendant committed breach of contract; and (c) that he was always ready and willing to perform his part of the obligation in terms of contract.

If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligation in terms of contract, necessarily he should step into the

witness box and give evidence that he has all along been ready and willing to perform this part. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preponderance on the other one without the other is not sufficient. The plaintiff has successfully brought this factum on record and it is rightly appreciated by both Courts below.

The concurrent finding do not therefore, warrant any interference on this unsubstantiated argument. Since no substantial question of law arises in the Second Appeal for consideration, the Appeal is dismissed.

In view of the dismissal of the Appeal, Civil Application No.104/2020 do not survive and is disposed off.

(SMT. BHARATI DANGRE, J.)