

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.223 OF 2021
WITH
INTERIM APPLICATION NO.2106 OF 2021**

Chandrabhan Sakharam Kange & Anr.	...Appellants
Versus	
Babasaheb Balu Kandalkar	...Respondent

Mr. S. S. Kulkarni, i/b. Mr. Ishan D. Khaire, for the Appellants.

Mr. P. N. Joshi a/w. Ms. Rukmini Khairnar & N. M. Pujari, i/b. Mr. Ashok S. Pandire, for the Respondent.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 20th DECEMBER 2022**

P.C. :

1. Heard Mr. S. S. Kulkarni, learned counsel appearing for the Appellants and Mr. P. N. Joshi, learned counsel appearing for the Respondent.

2. The Appellants are the Original Defendants. The suit has been filed by the Plaintiffs for specific performance of agreement dated 23rd September 2011. Learned Trial Court held that Plaintiff proved execution of the agreement and his readiness and willingness to perform his part of the contract.

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However, by holding that the said agreement of sale dated 23rd September 2011 was executed in the peculiar facts and circumstances of the case as Defendant No.1 was facing criminal case and therefore, relief of specific performance was denied to the Plaintiff by the learned Trial Court. The learned Trial Court directed the Defendants to refund to Plaintiff earnest money of Rs.6,75000/- along with interest at the rate of 18% per annum from 19th September 2011 till actual payment. The Original Plaintiff challenged Judgment and Decree dated 7th January 2015 of the learned Trial Court before the learned First Appellate Court. The learned First Appellate Court decreed the suit and directed that Plaintiff shall deposit in the Court balance consideration of Rs.9,75,000/- within 30 days from the date of decree and the same be paid to the Defendant No.1 and directed that Defendant No.1 i.e. present Appellant No.1 to execute the Sale Deed with respect to the suit property. In this Second Appeal, the Appellants-Original Defendants have challenged the Judgment and Decree dated 9th February 2021 of the learned First Appellate Court.

3. Mr. Kulkarni, learned counsel appearing for the

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Appellants submitted that the following substantial question of law is involved in the present Second Appeal:-

“Whether the discretion exercised by the learned First Appellate Court while decreeing the suit is properly exercised, as various factors are not taken into consideration and therefore, decree is contrary to Section 20 of the Specific Relief Act, 1963?”

4. Perusal of the impugned Judgment and Decree of the learned First Appellate Court clearly show that various factors which are on record including that there was criminal case/FIR was pending at the relevant time against the Defendant No.1 and the contention of the Appellants that Respondent No.1 took undue advantage of said criminal case has not been considered by the learned First Appellate Court.

5. Section 20 of the Specific Relief Act, 1963 [before substitution by Act 18 of 2018 (w.e.f. 1-10-2018)] is very relevant for the purpose of deciding substantial question of law raised in this Second Appeal. Said Section 20 reads as under:-

“20. Discretion as to decreeing specific performance:-

(1) The **jurisdiction to decree specific performance is discretionary**, and the Court is **not bound to grant such relief** merely because it is lawful to do so; but the **discretion** of the

Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in

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any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”

(Emphasis added)

6. The Supreme Court in the decision in **Smt. Katta Sujatha Reddy & Anr. vs. Siddamsetty Infra Projects Pvt. Ltd. & Ors.**¹

held that 2018 amendments of the Specific Relief Act, 1963 (hereinafter referred to as “the said Act”) is not a mere procedural but rather it had substantive principles built into its working. Said amendments can not apply retrospectively. It has been held by the Supreme Court that 2018 amendment to the said Act is prospective and can not apply to transactions that took place prior to its coming into force.

7. In this particular case, the agreement is dated 23rd September 2011 and therefore, 2018 amendment will not apply to the present case.

8. Therefore, it is necessary to examine the factual aspects of the present case on the touchstone of criteria as envisaged under unamended Section 20 of the said Act.

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9. The learned Trial Court while refusing to grant decree of specific performance given elaborate reasons in paragraphs 28 to 31 of the judgment by taking into consideration various factors enumerated in Section 20 of the said Act. Perusal of the record shows that the Judgment and Decree of the learned First Appellate Court is perverse as various factors emerging from the evidence including the factors taken into consideration by the learned Trial Court and which are necessary to be taken into consideration in accordance with unamended Section 20 of the said Act are not taken into consideration by the learned First Appellate Court.

10. Faced with above factual and legal position, Mr. Joshi, learned counsel appearing for Respondent No.1 took instructions and submitted that the Second Appeal be finally heard immediately and by setting aside the Judgment and Decree of the learned First Appellate Court, the matter be remanded back to the learned First Appellate Court. He only requested that as the suit is of the year 2012, the Appeal be directed to be disposed of expeditiously.

11. I have already recorded my satisfaction that the

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impugned Judgment and Decree of the learned First Appellate Court is passed without consideration of requirement of Section 20 of the said Act and the relevant evidence.

12. Thus, the Judgment and Decree dated 9th February 2021 passed by the learned District Judge-9, Nashik in Regular Civil Appeal No.361 of 2016 is required to be quashed and set aside and the said Regular Civil Appeal No.361 of 2016 is required to be restored to the file of learned District Judge, Nashik.

13. Learned Trial Court has granted refund of Rs.6,75,000/- to the Respondents and also granted interest of 18% per annum from 19th September 2011 till the actual payment is made. Mr. Kulkarni, learned counsel appearing for the Appellants states that Appellants will deposit the said amount of Rs.6,75,000/- with interest at the rate of 18% per annum from 19th September 2011 till date of deposit in the First Appellate Court. Mr. Kulkarni, learned counsel appearing for the Appellants after taking instructions states that the said amount with interest will be deposited in the First Appellate Court within a period of three months from today.

14. This order of deposit is necessary as the jurisdiction to

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deal with suit for specific performance is equity jurisdiction. If it is the contention of the Appellants that Respondent No.1 is not liable to the decree of specific performance then, it is the duty of the Appellants to deposit the entire earnest money with interest as directed by the learned Trial Court. It is also clarified that if such deposit is not made within time as per the statement made by the Appellant No.1, who is present in Court, then that factor will have to be taken into consideration while dealing with the Appeal by the learned First Appellate Court.

15. At this stage, it is pointed out that the Respondent has deposited the amount as per the impugned Judgment and Decree.

16. It is clarified that the deposit to be made by the Appellants as well as the deposit of money by the Respondent No.1 are without prejudice to the rights and contentions of both the parties. The said deposit made by the Respondent No.1 pursuant to Judgment and Decree dated 9th February 2021 of the learned First Appellate Court as well as the deposit which will be made pursuant to the present order in terms of the Judgment and Decree dated 7th January 2015 passed by the

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learned Trial Court shall be invested in any nationalised bank for suitable period by the learned First Appellate Court.

17. For the above reasons the Second Appeal is disposed of by passing following order:-

ORDER

(a) Judgment and Decree dated 9th February 2021 passed by the learned District Judge-9, Nashik in Regular Civil Appeal No.361 of 2016 is quashed and set aside and the said Regular Civil Appeal No.361 of 2016 is restored to the file of learned District Judge, Nashik.

(b) The Appellant No.1 to deposit the amount of Rs.6,75,000/- with interest at the rate of 18% per annum from 19th September 2011 till the date of deposit in the First Appellate Court within a period of three months from today.

(c) The said deposit made by the Respondent No.1 pursuant to Judgment and Decree dated 9th February 2021 of the learned First Appellate Court as well as the deposit which will be made pursuant

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to the present order in terms of the Judgment and Decree dated 7th January 2015 passed by the learned Trial Court shall be invested in any nationalised bank for suitable period by the learned First Appellate Court.

(d) Learned First Appellate Court is requested to dispose of the Regular Civil Appeal No.361 of 2016 on or before 31st August 2023.

18. It is clarified that this Court has not considered the merits of the case and all contentions of both the parties are expressly kept open.

19. The Second Appeal is disposed of in above terms with no order as to costs.

20. In view of the disposal of the Second Appeal, nothing survives in the Interim Application and the same is disposed of.

[MADHAV J. JAMDAR, J.]

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