

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR
SECOND APPEAL NO. 125/2020

- 1) Sampat S/o Baliram Thakre (Since deceased) through his legal heirs
- 1(a) Suresh S/o Sampatrao Thakre
Aged about 62 yrs, Occ. Agriculture
- 1(b) Baban S/o Sampatrao Thakre (Died)
through his legal heirs
- 1(b)(i) Smt. Vandanabai Wd/o Baban Thakre
Aged about 45 years, Occ. Agriculture
- 1(b)(ii) Chetan S/o Baban Thakre
Aged about 25 years, Occ. Agriculture
- 1(b)(iii) Ku. Kajal d/o Baban Thakre
Aged about 23 years, Occ. Agriculture
All (1) to 1(b)(iii) resident of At & Post
Badegaon, Tah. -Saoner, Dist. Nagpur
- 1(c) Smt. Sulochana Wd/o Madhukarrao
Pande, aged about 55 years,
Occupation – Service,
presently residents of Zingabai Takli,
Plot No. 6 Kale Layout, Sudarshan
Nagar, Godhani Road, Nagpur.
- 2) Mahadeo s/o Baliram Thakre (Died)
(Died on 29/09/2019)
through his representative
- 2(a) Nitin S/o Suresh Thakre (Dead)
Aged about 26 years, Occ. Agriculture
Resident of At & Post – Badegaon,
Tah. - Saoner, Dist. Nagpur
- 2(a) Nitin S/o Suresh Thakre (Died)
through his representative

Amended as
per order dt.
11.08.2022

2(a)(i) Suresh S/o Sampatrao Thakre
Aged about 63 years, Occ. Agriculture,

(a)(ii) Smt. Sunanda w/o Suresh Thakre
Aged about 55 years, Occ. Agriculture,

Both Resident of At & Post -Badegaon,
Tah. -Saoner, Dist Nagpur.
(Ori. Defendants)

..... Appellants

// VERSUS //

Damodhar S/o Ratanji Madne
Aged about Major, Occ. Business,
R/o Patansawangri, Tah. Saoner,
Dist. Nagpur
(Original Plaintiff)

.... Respondent

Mr. V.A. Umre, Advocate for the appellants
Mr. R.M. Pande, Advocate with Mr. S.K. Bhandarkar, Advocate for the
respondent

CORAM : AVINASH G. GHAROTE, J.

DATED : 27/09/2022

ORAL JUDGMENT :

Heard Mr. V.A. Umre, learned Counsel for the appellants and
Mr. R.M. Pande, learned Counsel for the respondent.

2. **Admit.** Heard finally by consent.

3. On 11.04.2022, notices were issued for final disposal on the
following substantial questions of law :-

(a) Whether the appellate Court substantially complied with the requirements of Order 41 Rule 31 of the Code of Civil Procedure, in framing points for determination in the light of the fact that the points framed by the appellate Court were verbatim reproduction of the issues framed by the trial Court while deciding the suit ?

(b) Whether the appellate Court was justified in reversing the finding of the trial Court on the aspect of readiness and willingness on the part of the respondent (original plaintiff) in performing his part of the contract ?

4. In so far as question no. (b) is concerned, it relates to the finding of the Courts below regarding readiness and willingness.

5. In a suit for specific performance filed by the respondent/plaintiff, the learned Trial Court though had recorded a finding that the plaintiff was not ready and willing to perform his part of the agreement, by its judgment dated 19.8.2008 (page 74) and, therefore, had passed a decree granting refund of consideration of Rs.1,00,000/- received by the defendants with interest @ 7% p.a. from the date of the agreement dated 03.04.2001 till its realization, the said judgment and decree passed by the Trial Court has been reversed by the learned First Appellant Court by rendering the finding that the plaintiff was ready and willing to perform his part of the contract [(point no. 3 page 28) (paras 38 to 50)].

6. It is not in dispute, that the appellants who were the original defendants, on 3.04.2001 had entered into an Agreement to sell

the land bearing Survey No.580/1 admeasuring 1.40H.R. and Survey No.71 admeasuring 0.61H.R., total admeasuring 2.01H.R. situated at Mouza Badegaon, Tahsil – Saoner, District- Nagpur for the total consideration of Rs.5,25,000/- out of which part consideration of Rs.1,00,000/- was received by the defendants on the date of the agreement itself, which position is not disputed. The balance consideration was payable by installments as under:-

Rs.1,00,000/-	On 30.07.2001
Rs.75,000/-	On 30.10.2001
Rs.75,000/-	On 28.02.2002
Rs.75,000/-	On 30.06.2002
Rs.1,00,000/-	Balance consideration on the date of sale deed which is to be executed on 10.10.2002

On the same day, a consent letter was executed by all the children of the defendants, granting consent to the transaction in question (Exh. 45).

7. Since, the land was held by the defendants in Class II rights, the plaintiff under the agreement itself agreed to get it converted to Class-I for which the defendants agreed to co-operate. So also, the land was to be got converted to non-agricultural use by the plaintiff, who had also agreed to get the same measured, for which also the defendants agreed to co-operate. The agreement indicated the possession of the land

was given to the plaintiff, who was also permitted to lay a layout dividing the land into various plots and enter into an Agreement of Sale in respect of the said plots. The defendants contend that in addition to consideration agreed to be paid under the agreement, the plaintiff, had agreed to give two plots, to the defendants. That condition is, however, not spelt out in the Agreement of Sale. It is contended that on 05.05.2001, when the plaintiff had gone to the land to level and demarcate the layout, he found Tendu Patta leaves spread over the land and the action on the part of the plaintiff, in trying to level the land, was obstructed. A notice thereof was given on 29.05.2001 (Exh. 46) in which, vide para no. 5, it was claimed that the responsibility of getting the land converted to non-agricultural use and so also, holding from Class-II to Class-I and of measurement was that of the defendants. Para no. 7 of the notice, however, made a statement that the application for conversion was given to the defendants, however, they had declined to sing it.

8. Mr. R.M. Pande, learned Counsel for the plaintiff, does not dispute, that though agreement indicates the delivery of possession, in fact possession was not so delivered and it always remained with the defendants. The notice dated 29.05.2001, was replied by the defendants on 21.06.2001, wherein the execution of the agreement was admitted,

however, a plea was raised that the consideration comprised was not only what was stated in the agreement alone but also, two plots in the layout which was to be laid by the plaintiff. This was refuted by the plaintiff by his notice/reply dated 02.07.2001(Exh. 51), which again was replied to by the defendants on 20.07.2001(Exh. 54) reiterating, what was stated in their earlier reply dated 21.06.2001. By the notice dated 24.09.2001(Exh. 57), the defendants terminated the agreement. Suit for specific performance was filed on 16.10.2001 on behalf of the plaintiff. The plaintiff examined himself as PW-1 as well as Sunil Harpate-photographer as PW-2 and Vitthal Lohakare, the attesting witness to the agreement as PW-3. On behalf of the defendants, both did not entered the witness box due to their old age, however, son of defendant no. 1 was examined as DW-1 [Exh. 79 (page 44)] and one Nana Bapurao Khandale, the attesting witness to the agreement dated 03.04.2001 was examined as DW-2 (Exh. 85). The learned Trial Court while answering the issue of readiness and willingness held that on 26.07.2001, the defendant had applied for conversion of holding of the land from Class-II to Class-I vide Exh. 87 to the Sub-Divisional Officer and, therefore, had performed the part of the contract and finding that none of the payments, as agreed to be made by the plaintiff, on the various dates indicated in the agreement, were made by the plaintiff and finding that there was no clause in the agreement that the payment of balance

consideration as per the installments in the agreement was dependent upon the plaintiff entering into Agreement of Sale of the plots in the land in question with third parties and receiving consideration thereunder, found that there was no readiness and willingness on the part of the plaintiff, as the payment indicated in the agreement was not made and, therefore, granted the alternate relief of refund of earnest money of Rs.1,00,000/- with interest at the rate of 7% p.a. as indicated therein.

9. The learned First Appellant Court on the point of readiness and willingness answered it in favour of the plaintiff by holding, that it was the defendants who failed to comply their part of the contract by denying signature on the necessary application for conversion of the land which was one of the condition contemplated by the agreement in question. It was further held, that since the non-cooperation was before the date fixed for payment of 1st installment which was dated 30.07.2001 as the notice indicating non-cooperation, was dated 29.05.2001(Exh. 46), the plaintiff was justified, in not making payment of the balance consideration as agreed and, therefore, granted a decree for specific performance directing the defendants to change the classification of the suit land as well as convert it to non-agricultural use and by allowing the plaintiff to enter upon it to level the suit land and

take measurement and demarcate the plots therein and, thereafter, execute and register the sale deed of the plots in favour of the plaintiff or prospective buyers. Further decree was passed directing the plaintiff to pay the balance consideration to the defendants within one month from the date of conversion of land i.e. Class-I to Class-II and diversion from agricultural to non-agricultural use.

10. Mr. V.A. Umre, learned Counsel for the appellants, raises two contentions, one, that the agreement in question, in fact did not correctly depict the entire consideration payable as the same did not reflect, the grant of two plots in addition to the consideration enumerated in the agreement, for which he relied upon the deposition of DW-1 and DW-3. The second contention that plaintiff was never ready and willing to perform his part of the contract as per its true construction and, therefore, mandatory requirement of Section 16(c) of the Specific Relief Act, 1963 (for short “the SR Act) did not stand fulfilled, as a result of which, the finding by the learned First Appellate Court in that regard according to him cannot be sustained.

11. Mr. R.M. Pande, learned Counsel for the respondent/plaintiff justified the judgment of the learned First Appellate Court and contended that it was the defendants, who had first breached the agreement by refusing the plaintiff, to level the land and lay a layout

and also by raising a false plea regarding the consideration being something more than what was stated in the agreement. He further submitted that the evidence of DW-1, was of no use, for the reason that he was not competent to depose on account of not having any knowledge regarding the transaction in question. He further submitted that substantial questions of law are required to be answered in the negative and second appeal be dismissed.

12. At the outset, to reiterate, the Agreement dated 03.04.2001, its execution and terms are not disputed by the parties. So also the fact, that the plaintiff was never put in possession of the suit property under the agreement, is also not disputed by the learned Counsel for the plaintiff.

13 The plea raised by the plaintiff, that DW-1, was not having any knowledge of the transaction, therefore, was unable to depose, has to be considered in the light of consent letter(Exh. 45), which is consent letter executed by DW-1 alongwith other children of defendant nos. 1 and 2, at the same time when the Agreement dated 03.04.2001 at Exh. 44 was executed, which is an admitted position even according to the plaintiff, which would indicate that DW-1 had knowledge regarding the transaction in question and was capable of deposing in respect of the same.

14. As contended by the learned Counsel for the appellants/defendants, the consideration in the Agreement dated 03.04.2001, according to them was an addition of two plots in the layout which was to be laid thereupon by the plaintiff. The evidence in this regard, is the evidence of DW-1 Suresh Sampat Thakare, the son of defendant no. 1 who had deposed as the Power of Attorney holder of the defendants is material. In his cross-examination, he categorically admits as under (page 155):-

“It is true that plaintiff, defendants, myself, Nana Khandale, Baban Thakare & Managala Khandale went to Saoner for preparing agreement & consent letter. It is true that as per say of plaintiff & deft petition writer has prepared agreement of sale & consent letter. It is true that petition writer has prepared above 2 document in Marathi, he read over & explained the contents to plaintiff, deft & all above persons. It is true that after admitting the contents of said agreement, defendants had put their signatures.”

15. The evidence of DW-2 - Nana Bapurao Khandale, the attesting witness to the agreement dated 03.04.2001 at Exh. 95 (Page 85 of the R. and P.) also contains the following statement in the cross-examination:-

“It is true that on 3.4.2001 plttf paid Rs.1 lac to the deft. Witness volunteers that it was given at Saoner. It is true that thereafter we came to Saoner & asked petition writer to prepare the agreement. It is true that at Saoner agreement was prepared by petition writer, it s contents were readover & explained to plttf, deft, Lohakare and myself in

vernacular. Witness volunteers that it was handwritten.”

16. Though both the witnesses, deposed, that the consideration was of two plots in addition to the monetary consideration enumerated in the Agreement dated 03.04.2001, however, considering the above evidence, on their behalf, which would indicate that the agreement was entered into by the defendants after the contents were read over to the defendants in vernacular, the same would indicate the incorrectness of the aforesaid plea regarding the additional consideration, as claimed by the defendants/appellants. The contention is, therefore, rejected.

17. On the point of readiness and willingness, there is no dispute that the plaintiff's affidavit-evidence of PW-1 contains an averment to that effect, however, in my considered opinion that by itself, is not sufficient to demonstrate the proof of readiness and willingness as is referred to by Section 16(c) of the SR Act.

18. What is also material to note is that the terms of the agreement, in reference to the payment of the balance consideration, in various installments, as indicated therein, did not make payment of the installments dependent upon any obligation, to be performed by the defendants and were totally independent. It is not in dispute that none of the installments from 30.07.2001 till 30.06.2002, have been ever offered or paid by the plaintiff to the defendants at any point of time,

whatsoever. May be the defendants, had claimed an additional consideration of two plots under the transaction in question, however, such a claim did not prohibit, the plaintiff from at least tendering the consideration as per the terms of the contract itself, which is totally absent in the matter. It is also material to note, that though it is claimed by the plaintiff that the defendants did not sign the necessary document for conversion, it has come on record that the application for conversion of holding of the land was made by the defendants, to the learned Sub-Divisional Officer on 26.07.2001(Exh.87). That apart, it is also not a condition of the terms of the contract that balance consideration as per the installments, would be payable by the plaintiff, from and out of the consideration which may be received by him upon entering into Agreements of Sale of the plots to be laid in the layout upon the suit land. It is thus apparent, that though the payment of installments, as per the terms of the Agreement did not depend upon any action/obligation to be performed by the defendants, the same were not done on the dates as fixed in the agreement, which in itself would adversely reflect upon the readiness and willingness of the plaintiff to perform his part of the contract.

19. The requirement of proof as contemplated by Section 16(c) of the SR Act, would indicate that the plaintiff in addition to making

specific averment in the plaint in that regard, has to adduce evidence to show availability of funds to make payment in terms of the contract in time. In other word, the plaintiff would have to plead and establish that he had sufficient funds and was in a position to raise funds in time to discharge his obligation under the contract. In case such evidence is not led and established on record, the readiness and willingness of the plaintiff cannot be presumed merely because of the existence of an averment in that regard in the plaint (*see U.N. Krishnamurthy Vs. A.M. Krishnamurthy, (2022) SCC OnLine SC 840*).

20. In the context of the above position, the perusal of evidence of the plaintiff who has examined himself as PW-1 would indicate that the proof as required by Section 16(c) of the SR Act, is totally absent. Nothing has been brought on record by the plaintiff to indicate and establish that during the currency of the agreement the plaintiff had sufficient funds or was in a position to raise the funds in time to discharge his obligation.

21. Though, the learned First Appellate Court in para no. 40 of the judgment (page 39) notes the fact, that the defendants had applied before the Sub-Divisional Officer for conversion of the land on 26.07.2001 which Exh. 87 indicates, still it goes on to hold that the co-operation, which the agreement required from the defendants, was not

forthcoming which is clearly contrary to what Exh.87 indicates. The evidence of PW-2 the photographer and PW-3 Vitthal Lohakare, in relation to the possession of the land is concerned, would have no bearing in matter in issue regarding readiness and willingness of the plaintiff to perform his part of the contract, for the reason already indicated above, that the payment of the balance consideration as per the terms of the Agreement dated 03.04.2001, was not dependent upon any action/obligation to be performed by the defendant and therefore, was not done.

22. It appears that the learned First Appellate Court has merely relied upon the averment of the plaintiff in the plaint as well as oral evidence, without considering evidence on record. Mere averment cannot displace the requirement of proof as is contemplated by Section 16(c) of the SR Act, in view of which the finding of the learned First Appellate Court in this regard cannot be sustained.

23. There is yet another reason to interfere with the judgment of the learned First Appellate Court. The operative part of the judgment of the First Appellate Court reads as under (page 48):-

“Order

I) The appeal is allowed.

II) The judgment and order passed in Special Civil Suit No.765/2001, dated 19.08.2008, by learned 8th Jt Civil

Judge, Sr. No., Nagpur, is hereby quashed and set aside.

III) Special Civil Suit No. 765/2001 is partly decreed.

IV) The respondents-defendants are hereby directed to perform their part of contract from changing the classification of the suit land admeasuring 2.01 hectares and also converting the suit land survey numbers from agricultural use to non-agricultural use, and allowing the appellant-plaintiff, his servants, agents etc. to enter upon and level the suit land and take measurement and demarcate plots therein and thereafter to execute and register the sale deeds of the plots in favour of the appellant-plaintiff or prospective buyers of the plots of the layout.

V) The appellant-plaintiff is directed to pay the balance consideration amount to the defendants within one month from the date of conversion of land i.e. change of classification from Class-II to Class-I and diversion from agriculture to non-agriculture land.

VI) The respondents-defendants are hereby directed to execute sale-deed of the suit land within one month from the date of depositing the remaining balance consideration amount in the court by the appellant-plaintiff, failing which, the appellant-plaintiff is at liberty to get it executed through Court.

VII) A decree be drawn up accordingly.

Nagpur

09/09/2019

Sd/

(Smt. P.F. Sayyad)

Special Judge, Special Court

for differently abled persons

Senior Citizens and Marginalized

Section of Society, Nagpur"

24. As indicated above, the terms of the Agreement dated 03.04.2001 did not cast any obligation upon the defendants, either to

get holding of the land to be converted from Class-II to Class-I or use of the land from agricultural to non-agricultural, or for that matter to get the land measured. All these obligations were upon the plaintiff and the defendants were only required to co-operate with the plaintiff in this regard. By the aforesaid relief granted by the learned First Appellate Court all the obligations which were upon the plaintiff have been saddled upon the defendants. Not only that, operative part No. (V) of the aforesaid order directs the payment of the balance consideration to the defendants within one month from the date of conversion of holding of the land from Class-II to Class-I and diversion of the user from agricultural to non-agricultural. It thus appears that the learned First Appellate Court has carved out new terms for the plaintiff, contrary to what is spelt out from the Agreement dated 03.04.2001(Exh. 44), on account of which also the same cannot be sustained.

25. Thus, in view of what has has been stated in the judgment of the Hon'ble Apex Court in *U.N. Krishnamurthy* (supra) regarding requirement of proof of readiness and willingness as per Section 16(c) of the SR Act, in juxtaposition to the evidence of PW-1, it would be apparent that the proof of the same, is totally absent in the matter.

26. Though, Mr. R.M. Pande, learned Counsel for the respondent has relied upon *Balwant Vithal Kadam Vs. Sunil Baburaoi*

Kadam, (2018) 2 SCC 82 (para 17) to contend that the finding of the fact recorded by the Court below, on appreciation of evidence led before the Trial Court ought not to be disturbed in second appeal, what is necessary to be noted, is that insofar as the readiness and willingness is concerned, the learned Trial Court, which answered issue no. 3 regarding the same has answered it in the negative (para 17 page 89). That apart, the entire evidence, of the PW1, is sans any proof regarding the readiness and willingness in view of which the finding rendered by the learned First Appellant Court in this regard, clearly ignores the absence of proof of readiness and willingness which is mandatory requirement of law as per Section 16(c) of the SR Act, considering which it would have to held that such finding is without evidence altogether and, therefore, is perverse and cannot be sustained and would be open for consideration in second appeal [*see Ravi Setia Vs. Madan Lal, (2019) 9 SCC 381 (paras 10 and 15)*].

27. In the light of the aforesaid discussion, the substantial question of law as framed in para 2(b) of the order dated 11.04.2022 is answered in the negative. In view of the aforesaid answer, it is not necessary to advert to or answer question no. 2(a).

28. In view of the aforesaid discussion, the judgment and decree dated 09.09.2013 passed by the learned First Appellate Court in

Regular Civil Appeal No. 254/2012, is hereby quashed and set aside and the judgment and decree of the learned Trial Court dated 19.08.2008 passed in Special Civil Suit No. 765/2001 is hereby restored.

29. The second appeal is allowed. No costs.

30. Pending civil application, if any, is also disposed of.

JUDGE

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MAHADEV
GATE
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signed by
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