

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 387 OF 2018

Ashok S/o. GovindSao Suryawanshi,
Age 42 years, Occup: Mechanic,
R/o. Itwari, Pusad, Tq. Pusad,
Dist. Yavatmal.

.... **APPELLANT.**
(Org. Plaintiff)

// VERSUS //

1. Sanjay Prabhakar Tute,
Age 42 years, Occup: Labour,
2. Vijay Prabhakar Tute,
Age 42 years, Occup: Labour,

Both R/o. Jagdamba Nagari, Pusad,
Tq. Pusad, Distt. Yavatmal.
3. Sau. Anjali Dattyaopant Kadwe,
Age 45 years, Occup: Household,
R/o. Kale Fail, Washim.

.... **RESPONDENTS.**
(Org. Defendants)

Shri Abhay Sambre, Advocate for Appellant.
Shri C.S.Kaptan, Sr. Adv. a/b. Shri P.S.Chauhan, Advocate for the
Respondents.

CORAM : ANIL S. KILOR, J.
DATE OF RESERVING THE JUDGMENT : 03/12/2021
DATE OF PRONOUNCING THE JUDGMENT : 29/04/2022

JUDGMENT :

1. In this appeal a question has been raised to the correctness and legality of judgment and decree dated 20th June 2018 passed by the Ad-hoc District Judge-1, Pusad in Regular Civil Appeal No. 1 of 2016 allowing the appeal and thereby dismissing the suit for specific performance of contract and permanent injunction by further setting aside the judgment and decree dated 03/12/2015 passed by the Civil Judge Senior Division, Pusad in Special Civil Suit No. 39 of 2010.

2. The brief facts of the present case are as follows: (The parties are referred to as per their status before the trial Court.)

The plaintiff/ appellant filed a suit for specific performance of contract and permanent injunction. It is the case of the plaintiff that the defendants are the owners of the house having Municipal Property No. 313, Nazul Sheet No.28, Plot No.7, admeasuring 14 x 42 feet, situated Itawa Ward, Pusad. It is the further case of the plaintiff that the defendant Nos. 1 and 2 entered

into an agreement of sale, of the suit property dated 12/12/2008 for a consideration of Rs.5,50,000/- out of which the plaintiff paid Rs.1,70,000/- as an earnest amount. The date of sale deed was agreed on or before 25/03/2009 by accepting the remaining sale consideration.

3. It is pleaded that the plaintiff was/is always ready and willing to perform his part of the contract. It is further stated that on 25/03/2009 the plaintiff had been to the office of Sub-Registrar for getting the sale deed executed. There he got the knowledge that permission of Sub-Divisional Officer would require.

4. It is further pleaded that though the Sale Deed was not executed on 25/03/2009 on a request of defendant Nos. 1 and 2 the plaintiff had given them remaining sale consideration of Rs.3,80,000/-. Thereupon the defendant Nos. 1 and 2 gave him possession of the suit property on 20/04/2009 and informed the plaintiff that they have applied for permission for execution of the sale deed, to the Sub-Divisional Officer.

5. It is further stated that the defendant Nos. 1 and 2 avoided execution of the sale deed and on verification it was revealed that the defendant Nos. 1 and 2 are the co-owners and defendant No.3 is also the owner of the suit property. Thereupon the plaintiff issued notice dated 08/06/2010 through Advocate and thereby called upon them to execute the sale deed of the suit property. The defendant No.3 received the notice but did not reply it and even not complied with the said notice. The notice sent to the defendant Nos. 1 and 2 were not served on the ground that their addresses were changed and therefore, fresh notice dated 29/06/2010 was issued which was received by them. However, on failure to comply the notice the suit for specific performance was filed.

6. The defendant Nos. 1 and 2 filed their written statement and denied receipt of earnest amount or they agreed to execute the sale deed on getting the permission from the Sub-Divisional Officer. However, they have admitted of giving possession of the suit property on 20/04/2009. It is stated that

they were in need of money for treatment of cancer of their mother, therefore, they approached the plaintiff for hand loan of Rs.2,00,000/-. As the plaintiff was not ready to give hand loan without executing the “Vikri Chitthi” the defendant Nos.1 and 2 executed the Agreement of Sale dated 12/12/2008 for security. It is pleaded that the said transaction was money lending transaction and as they were in need of money the possession was delivered to the plaintiff. It is agreed by the defendant Nos. 1 and 2 that they have received total amount of Rs.2,00,000/-. It is further stated that, though they are ready to repay the amount of Rs.2,00,000/- the plaintiff is avoiding to receive the same.

7. The defendant Nos. 1 and 2 filed counter claim along with the written statement and prayed for relief of possession, which was resisted by the plaintiff by filing written statement and by denying that the transaction between him and defendant Nos. 1 and 2 was of the money lending transaction.

8. The learned trial Court, after scrutinizing the oral as well as documentary evidence available on record, partly decreed the suit and it is held that the plaintiff is entitled to decree of specific performance of contract to the extent of undivided share of defendant Nos. 1 and 2. It is further directed that the defendant Nos. 1 and 2 to execute the sale deed of the suit property to the extent of their undivided shares within 30 days in favour of the plaintiff and further they were restrained from causing interference or obstruction to the plaintiff over the suit property till the share of defendant No.3 is carved out by the order of the Court vide judgment and decree dated 03/12/2015 passed by Civil Judge Senior Division, Pusa in Special Civil Suit No. 39 of 2010.

9. The defendant Nos. 1 and 2, feeling aggrieved by the said judgment and decree dated 03/12/2015, carried an appeal namely Regular Civil Appeal No. 1 of 2016 before the Ad-hoc District Judge-1, Pusa. The learned first appellate Court allowed the appeal and dismissed the suit of the plaintiff for specific performance and further directed the defendants to refund

Rs.2,00,000/- to the plaintiff within two months upon which the plaintiff shall hand over the possession of the suit property to the defendants, vide judgment and decree dated 20/06/2018, which is under challenged in this appeal.

10. This Court, on 30th July 2018, while issuing notice, framed the following substantial question of law :

“Whether the evidence on record that was considered by the trial Court while holding the agreement at Exh.54 and the document indicating delivery of possession at Exh.65 to be valid has been taken into consideration by the appellate Court while reversing the finding?”

11. I have heard the learned counsel for the respective parties.

12. Shri Sambre learned counsel for the appellant submit that the suit was for execution of the sale deed and not for specific performance, he therefore, submits that both the Courts below have committed error in considering the suit of the plaintiff, for specific performance.

13. He further submits that no proper reasons are given by the learned first appellate Court while reverting the findings recorded by the learned trial Court that the agreement at Exh.54 and the documents indicating delivery of possession at Exh.65 are valid and sufficient to decree the suit.

14. Shri Kaptan, learned Senior Advocate for the respondent submits that the learned first appellate Court has not committed any legal infirmity in dismissing the suit and reversing the judgment and decree dated 3rd December 2015 passed by the Civil Judge Senior Division, Pusad in Special Civil Suit No. 39 of 2010, decreeing the suit.

15. Shri Kaptan, learned Senior Advocate appearing for the respondent submits that the pleadings in the suit clearly show that the suit was for specific performance and the learned first appellate Court has rightly denied the decree in view of the well settled principles of law in this regard.

16. It is submitted that the issue was framed by the trial Court as regards readiness and willingness of the plaintiff to perform his part of the contract and also an issue whether the plaintiff is entitled to the decree of specific performance of contract. Thus, he submits that both the Courts have rightly considered the suit filed by the plaintiff is for 'specific performance of contract'. He further submits that the learned first appellate Court has rightly denied the decree. For this purpose, he has placed reliance on the judgment of Hon'ble Supreme Court of India in the case of *Pemmada Vs. Youngmen's Vysya Asso.*¹.

17. To consider the rival contentions of the parties, I have perused the record and proceedings and also the judgments and decrees of both the Courts below.

18. After going through the pleadings, including the pleading that the plaintiff was and is ready and willing to perform his part of the contract. Furthermore, the issue Nos.3 and 4 framed

¹ 2015(6) Mh.L.J. 487

by the learned trial Court i.e. in respect of readiness and willingness and whether the plaintiff is entitled for specific performance, show that the suit was filed for specific performance.

19. There is nothing to show that the plaintiff ever had taken any objection to issue Nos. 3 and 4 framed by the trial Court or any request was made for recasting of the same. In that view of the matter, both the Courts have not committed any error in considering the suit of the plaintiff for specific performance.

20. In the case of *Pemmada* (supra) the Hon'ble Supreme Court of India has held thus :

“33. ... It is an undisputed fact that the plaintiffs have not approached the Trial Court with clean hands. It is evident from the pleadings of the Agreement of Sale which is produced for the decree for specific performance of Agreement of Sale as the plaintiffs did not obtain the signatures of all the co-sharers of the property namely, the mother of the defendants, the third brother and 3 sisters. Therefore, the agreement is not enforceable in law as the persons who have executed the sale deed, did not have the absolute title of the property. Apart from the said legal lacuna, the terms and conditions

of the Agreement of Sale for payment of sale consideration agreed to be paid by the first plaintiff in installments within the period stipulated as indicated above were not paid. The First Appellate Court and the High Court have not exercised their power under Section 20(2) of the Specific Relief Act which by itself is the substantial question of law which fell for consideration before the High Court as the First Appellate Court failed to consider this important aspect of the matter and exercised its power while determining the rights of the party, particularly, in the light of the unenforceable contract between the plaintiffs against the defendants as all of them are not parties to the Agreement of Sale document (Ex.-A1) and the executants viz. defendant Nos. 1 and 2 have not acquired absolute title to the property in question. Therefore, the impugned judgment is vitiated and liable to be set aside.

21. In the teeth of above referred observations made by the Hon'ble Supreme Court of India in the case of *Pemmada* (supra) I revert back to the facts of the present case.

22. In this case, there is no dispute that the suit house was owned by defendant Nos. 1, 2 and 3, whereas, the agreement contains signature of the defendant No.1 and 2 and not of the defendant No.3.

23. It has come in the cross-examination of the plaintiff that the plaintiff had not inquired about the prevailing market rates in the year 2008. He had inquired the ownership of the suit house in the local area, where suit house is situated but not inquired about the ownership of the suit house in the Municipal Council, Pusad or in Nazul Department. He further admits that he did not demand any papers of ownership to defendants or published a notice in the newspaper about the said transaction.

24. The plaintiff in his cross-examination admits that he did not intimate the defendants in writing to remain present for executing the sale deed on or before 25/03/2009. He states that when he visited the office of Registrar, he came to know that for registration of half property, a permission of registering authority is required. He at the same time admits that he did not inquire during the period of 25/03/2009 to 20/04/2009 in the office of Sub-Divisional Officer to ascertain whether defendants had made any application for permission to sell the suit house. He states that he did not issue any letter or notice to the defendants to obtain

such permission. The plaintiff further admits that he had never issued notice to defendant No.3 informing her about the alleged transaction. He also admits that in the agreement to sell dated 12/12/2008 and notarized sale deed dated 28/04/2009 the property number is not mentioned.

25. Similarly, P.W. 2 admits in his cross-examination that he signed the agreement Exh.54 on a request of witness No.2. He further admits that he did not read the contents of the agreement before signing it. He also states that no transaction took place in front of him between the plaintiff and defendants.

26. The evidence of P.W. 3 is also on the same lines, who has stated that on a request of Santosh Suryawanshi he signed as a witness to Exh.54. He states that when he was standing under a tree there Mr. Suryawanshi came and requested to sign the document and accordingly he signed it.

27. P.W. 4 also states the similar fact about Exh.65 that at the house of defendant No.1 plaintiff was present and while going to his field, they called him and asked him to sign on a written document. He further states that he does not know what transaction took place between the plaintiff and the defendants.

28. Contrary to the evidence of P.W.4, P.W. 5 states that Exh.65 was signed in his office. He further admits that he had no authority or power to notarize the sale deed.

29. Furthermore, the plaintiff has not brought on record evidence establishing the total amount of consideration paid by him to the defendants, as he has pleaded in the plaint.

30. The defendants Nos. 1 and 2 have come up with the case that it was a money lending transaction and they had received Rs.2,00,000/- and not Rs.5,51,000/-. In the light of denial of the defendant Nos. 1 and 2 that they received total consideration of the suit house, the plaintiff ought to have pleaded and proved the

payment of amount of consideration. Thus, even if for a moment the agreement is considered as not of money lending transaction, in absence of an evidence to establish readiness and willingness to perform his part of the contract, decree for specific performance cannot be granted.

31. The evidence of the plaintiff further creates doubt about genuineness of the transaction. In normal circumstances any prudent man, before making payment of such a huge amount, will make necessary inquiry about the ownership and about all other relevant factors. In this case, in cross-examination the plaintiff has categorically admitted that he never made any inquiry in the office of Municipal Council about the ownership of the suit house or he even did not make any inquiry whether the defendant Nos. 1 and 2 have made any application for grant of permission to execute sale deed in favour of the plaintiff. The evidence of plaintiff and witnesses to Exh.54 and 65, goes against the plaintiff. In the circumstances, I do not find that any error is committed by learned

first appellate Court in reversing the findings recorded by the learned trial Court that Exh.54 and Exh.65 are valid documents.

32. I have accordingly answered the substantial question of law in above terms and as I do not find any merit in the present appeal, I pass the following order.

The Second Appeal is **dismissed**. No order as to costs.

Pending Civil Application(s), if any, shall stand **disposed of**.

At this stage, learned counsel for the appellant is praying that not to give effect to the judgment for a period of six weeks and to continue ad-interim relief granted on 03/08/2018.

Shri Chauhan, learned counsel for the respondent is opposing the such prayer and he has cited judgment of the Hon'ble Supreme Court of India in the case of *State of U.P Secretary Vs. Prem Chopda*.

Considering the request made by the learned counsel counsel for the appellant and the resistance of the respondent to grant such prayer. I am of the opinion that since in this case, the interim relief is an operation since 03/08/2018, thus, in the interest of justice, it shall continue for a period of six weeks, from today, which shall stand automatically vacated thereafter.

(ANIL S. KILOR, J)

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