

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

SECOND APPEAL NO. 764 OF 2004

WITH

CIVIL APPLICATION NO. 459 OF 2020

WITH

CIVIL APPLICATION NO. 7654 OF 2002

WITH

CIVIL APPLICATION NO. 11011 OF 2016

**Devidas Jaiwantrao Deshmukh,
Died, through his legal representatives -**

- 1) Smt. Shobhabai w/o Devidas Deshmukh,
Age; 52 years, Occ; Household,
- 2) Sow. Chayabai w/o Pravinkumar
Kulkarni
Age; 32 years, Occ; Household,
- 3) Sow. Maya w/o Arvindkumar
Deshpande,
Age; 29 years, Occ; Household,
- 4) Jaikumar Devidas Deshmukh,
Age; 27 years, Occ; Agriculture,
- 5) Kum. Shanta Devidas Deshmukh,
Age; 26 years, Occ; Household,

All R/o; Murud Akola, Tq. & Dist. Latur.

**...APPELLANTS.
(Orig. Defts.)**

VERSUS

- 1) Bhagwat s/o Vishwanath Gheware,
Age; 52 years, Occ; Agriculture,
- 2) Rajabhau s/o Shankarrappa Gheware,
Age; 57 years, Occ; Agriculture,
R/o; Murud Akola, Tq. Latur,
District; Latur. ...**Died, through his legal
Representatives -**
- 2-A) Sanjay Rajabhau Gheware,
Age; 38 years, Occ; Agriculture,
R/o; Murud Akola, Tq. & Dist. Latur.
- 2-B) Bhimashankar s/o Rajabhau Gheware,
Age; 35 years, Occ; Agriculture,
R/o; Murud Akola, Tq. & Dist. Latur.
- 2-C) Smt. Shalubai Widow Rajabhau Gheware, ...**RESPONDENTS.**
Age; 55 years, Occ; Household, **(Orig. Pltffs.)**
R/o; Murud Akola, Tq. & Dist. Latur.

Advocate for the Appellants : Mr. Mr. M.A. Manjramkar
Advocate for the Respondents : Mr. Sharad S. Halkude

CORAM : KISHORE C. SANT, J.

Date of Reservation : 12.09.2023

Date of Pronouncement : 09.11.2023

JUDGMENT :

1. This Second Appeal arises out of judgment and order passed by the learned District Judge, Latur in RCA No. 42 of 1995, allowing an appeal thereby setting aside the judgment and decree

of the trial Court and substituting the same. The appellants are the original defendants in a suit for specific performance of contract. The trial Court while partly decreeing the suit, directed appellants/defendants to refund an earnest money. Whereas, the appellate Court by way of impugned judgment directed appellants/defendants to execute a sale deed of the suit land. The appellants/original defendants are thus before this Court. The parties are hereinafter referred to as per their original status in the suit.

2. The facts in short are that the plaintiff had filed a suit for specific performance of contract and for perpetual injunction. All the appellants are legal representatives of deceased Devidas, who was occupier of the land block No. 9, to the extent of 10 Acres 31 Guntha from North-East corner, situated at village Murud, Akola, Taluka Latur. The defendant was not personally cultivating the suit land, it was given to the plaintiff for cultivation on crop share basis, since 1979. For the family necessity i.e. for performance of marriage of daughter defendant entered into an agreement to sale the land with the plaintiff and original defendant No. 2 for consideration of Rs. Rs. 30,000/-. An agreement took place in the month of October, 1988. An agreement was oral

agreement entered into in the presence of one Subhash Gurling Belapure and Bhagwan Vithaldas Bhutada. Since the land was an Inam land, it was the defendant, who was required to obtain permission for sale from Competent Authority. On the date of agreement the plaintiff and defendant No. 2 paid Rs. 20,000/- to the defendant No. 1 and Rs. 5,000/- were to be paid at the time of execution of agreement by the plaintiff. Lateron, a joint affidavit was executed on 11.10.1982 for obtaining permission of the suit land. An amount of Rs. 25,000/- was paid till that time.

3. Pursuant to the application for permission, the Competent Authority even granted permission to the defendant to sale land by order dated 14.10.1990. The Plaintiff therefore, requested defendant to execute the sale deed by accepting remaining amount of Rs. 5,000/-. However, he avoided to execute the sale deed, therefore, a notice came to be issued to him through an Advocate on 17.10.1990. The defendant even refused to accept the notice. On this background the suit was instituted.

4. It is the case of the defendant that he was cultivating the land till 1978 personally. Defendant No. 1 decided to shift to Latur in December, 1978. In December, 1978 he orally contracted to sale his share to the plaintiff and original defendant No. 2 jointly

for an amount of Rs. 30,000/- by obtaining earnest amount of Rs. 15,000/-. The plaintiff and defendant No. 2 were put in possession by the defendant. The possession is thus permissive possession on the basis of an agreement to sale. It is stated that there was a need of money for the purpose of family necessity and the marriage of his daughter. It is thus the case that the land was to be purchased by the plaintiff and defendant No. 2 jointly and not only by the plaintiff. However, since defendant No. 2 has not come forward for the sale deed, the sale deed could not be executed. It is further defence that when an agreement was with the plaintiff and defendant No. 2, the plaintiff cannot claim performance without joining defendant No. 2 and if the performance is to be sought, it should be by all the parties to the agreement. It needs to be noted that during pendency of the suit, defendant No. 2 filed an application for transposition as plaintiff. The said application came to be allowed and defendant No. 2 came to be transposed as plaintiff No. 2.

5. The trial Court accepted the case of the defendant that the plaintiff alone cannot seek specific performance when defendant No. 2 was not ready to purchase the land. As per the agreement, the plaintiff alone could not sought specific

performance. This Court framed substantial question of law is as to whether the appellate Court is justified in holding that there are sufficient pleadings, that are made on behalf of plaintiff, in respect of their plea regarding readiness and willingness to perform their part of the contract. This Court thus proceed with the substantial question of law.

6. This Court in view of the above facts admitted the Second Appeal by order dated 05.07.2006 by framing following substantial question of law :

“Whether the first appellate Court is justified in holding that there are sufficient pleadings and proof, led on behalf of the plaintiffs, in respect of their plea regarding the readiness and willingness to perform their part of the contract.”

7. In view of arguments on the last occasion and also in view of the arguments advanced by both the parties, following substantial question of law came to be framed :

“As to whether it is necessary for the parties to the agreement to seek specific performance and as to whether the specific performance can be granted at the instance of any of the parties to the agreement on one side.”

8. Both the parties are ad-idem and they have advanced

arguments on the substantial question of law framed by this Court.

9. To show that the plaintiff was not ready and willing to perform their part of the contract. The evidence is taken and the defence that an agreement was entered into between the plaintiff and defendant No. 2 on one hand and defendant No. 1 on the other hand. While seeking performance it is only the plaintiff who sought specific performance. Since all other facts are accepted, this Court proceed to decide the substantial question of law on the basis of legal position.

10. Learned trial Court had refused a decree holding that since only plaintiff No. 1 had sought specific performance and therefore, they have failed to prove the readiness and willingness to perform the part of the contract and had directed defendant to refund an amount of consideration @ 9% p.a. The learned District Judge however, substituted the decree by directing specific performance in favour of the plaintiff.

11. The learned Advocate for the appellants vehemently argued that the trial Court had rightly passed the judgment and order and partly decreed the suit directing to refund an earnest amount. The appellate Court however, committed an error by

substituting decree, directing specific performance. Whereas, the learned Advocate for the respondent/original plaintiff submitted that the co-purchaser alone can file a suit and pray for decree of specific performance. It is not necessary for all the proposed purchasers to file a suit jointly. In any case, later on pending the suit, defendant No. 2 was transposed as plaintiff No. 2 and thus assuming that there was no technical flaw, the same has removed. From the evidence of PW-1 Bhagwat, it has come on record that the suit property was to be purchased jointly by him and plaintiff No. 2. Though the specific performance was asked for by sending a notice, the same was refused. The notice sent by post was refused by the defendant. It has come in the evidence that an earnest amount of Rs. 25,000/- was jointly paid by both the plaintiff. In the last paragraph of his cross-examination he denied the suggestion that he alone insisted for execution of the registration of the sale deed only in his favour. Thus, on factual aspect also, the plaintiff in fact made out the case for specific performance and the specific performance was sought for by both the plaintiff.

12. The learned Advocate for the appellants relied upon the following judgments :

1) **2005 DGLS (SC) 973- Uday Shankar Triyar v.**

Ram Kalewar Prasad Singh.

2) **AIR 2022 SC 4732** – *Satyendar and Others v. Saroj and Others.*

3) **2022(5) ALL MR 708** – *Mrs. Jayshri w/o Rameshchandra Bhore v. Arvind s/o Narayanrao Tarekar & Anr.*

4) **2023 (3) ABR 175** – *Indumati Ramkrishnadevasthali alias Indumati Venkatesh Tengse Alias Indumati Vencotexa Boto and others v. Shrikant Madhusudhan Devasthali and another.*

5) **AIR 2022 SC 4601** – *Chandrabhan (Deceased) through Lrs. And others v. Saraswati and othrs.*

6) **AIR 2022 SC 4732** – *Satyender and others v. Saroj and Others.*

7) **AIR 2022 SC 4710** – *Moreshar Yadaorao Mahajan v. Vyankatesh Sitaram Bhedi (D) Thr. Lrs. And others.*

8) **AIR 2010 SC 2679** – *Dinesh Kumar Vs. Yusuf Ali.*

9) **(2001) 3 SCC 179** – *Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs.*

10) **AIR 1951 SC 120** – *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narian Singh and others.*

13. In the case of **Uday Shankar** (supra) the Hon'ble Apex Court considered the provisions of order VI Rule 14 of the CPC. This Court finds that this case law is not relevant for the purpose of deciding this case.

14. The respondent relied upon the following judgment :

a) In (2007) 4 PIR 238 (Punjab and Hariyana High Court) - Jaswant Singh And Ors. Vs. Mukhtiar Singh And Anr. It is held that the suit for specific performance of contract can be filed if there are more parties than one.

15. As regards the judgment in the case of **Satyendar** (supra) the said judgment is in respect of scope of Section 100 of the Indian Evidence Act, in respect of burden of proof in the case of suit under the Specific Relief Act for declaration and possession in a suit for declaration and possession. This Court finds that the said judgment is also not applicable to the case in hand.

16. In the case of **Mrs. Jayshri** (supra) this Court was considering the provisions of Section 54 of the Transfer of Property Act. This Court finds that even this case law is not relevant for the purpose of deciding this appeal.

17. So far as the case of **Indumati** (supra) the question was in respect of recall of order after the order of closure of evidence is raised. It was held that consequences of closure of evidence are extremely harsh, if plaintiff served an opportunity to lead evidence. The approach of the trial Court was held to be wrong in that case.

This Court finds that this case is not applicable in the present case.

18. In the case of **Chandrabhan** (supra), the Hon'ble Apex Court considered scope of Section 100 of the Civil Procedure Code and need of formulation of substantial question of law, the Court has laid down test for determining whether question raised in the case is a substantial question of law. It is held that as a general rule the High Court will not interfere with the findings of facts arrived at by the subordinate Court. It is further held that it is not absolute rule, holding that it can be entertained even when 1) the subordinate Courts have ignored the material evidence or acted on no evidence, 2) the Courts have draw wrong inference from the true facts by applying law erroneously. And 3) the Courts have wrongly casted burden of proof. There cannot be any dispute about the above propositions. The appellants have failed to show how this judgment is applicable to the facts of this case.

19. In the case of **Moreswar Mahajan** (supra) the Hon'ble Apex Court considered the scope of order I Rule 10 of the CPC in a suit for specific performance. In the facts of that case the Hon'ble Apex Court directed to refund earnest amount in suits for specific performance. It was held that necessary party is a person who ought to have been joined as a party and in whose absence no

effective decree could be passed at all by the Court. In this case this Court finds that the plaintiff No. 2 was added as defendant No. 2 initially and this is not a case of non joinder of party. Thus, this case law is also not applicable to the facts of this case.

20. In **Dinesh Kumar** (supra) it was a suit arising out of rent control Act. The Hon'ble Apex Court in that case held that in Second Appeal finding of fact can be interfered only if it is found to be perverted.

21. In case of **Santosh Hazari** (supra) the Hon'ble Apex Court held that improper finding of the first appellate Court may give rise to substantial question of law. The judgment of the first appellate Court must display conscious application of mind and record finding supported by reasons on all issues and contentions.

22. The appellate Court in paragraph No. 7 has considered all the facts. It is observed that the trial Court wrongly observed that there was a quarrel between the plaintiff and that is taken as that the plaintiff is not ready and willing to perform their part of contract. The Court also considered that when the plaintiff No. 2 initially was not prepared to join the plaintiffs, plaintiff No. 1 had no option but to file a suit on his own by making plaintiff No. 2 as

defendant No. 2. Lateron, defendant No. 2 filed an application and got himself transposed as plaintiff. The Court has observed that plaintiff No. 2 never stated that the suit of the plaintiff No. 1 was not correct. No adverse interest of plaintiff No. 2 is shown. The Court rightly observed further that after amendment was allowed and defendant No. 2 was transposed as plaintiff No. 2 the said amendment relate back to the date of filing of the suit and thus, the suit was filed by both the plaintiffs.

23. Thus, by considering above this Court finds that none of the observations of the appellate Court can be said to be perverse. This Court finds that no case is made out by the appellants to set aside the judgment and decree of the appellate Court.

24. In another case reported in **(2003) 1 RCR 133** - Narinder Kaur and Ors. Vs. Nagina Singh and Ors., wherein again it is held that the suit at the instance of any one is maintainable.

25. He further relied upon the judgment of this Court in **Second Appeal No. 457 of 2000** in the case of Kasturbai Himmat Patil Vs. Leelabai w/o Sada Patil. In the said case this Court dealt with some what similar case and held that any one of the parties can seek specific performance of the contract, In that case also the

proposed co-purchaser was a party and impleaded as defendant No.5.

26. Thus, considering legal position and the above cited judgments, this Court do not find any reason to interfere with the judgment of the learned District Judge. No case is made out by the appellants to entertain the appeal. The appeal is therefore, dismissed. No order as to the costs. In view of the disposal of main appeal, the pending Civil Applications stand disposed off.

(KISHORE C. SANT)
JUDGE

mahajansb/