

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

**SECOND APPEAL NO. 71 OF 2019
WITH CIVIL APPLICATION NO. 122 OF 2018
WITH CIVIL APPLICATION NO. 123 OF 2018**

Shalubai w/o Narsappa Vengane
Since deceased, through her L.R.

Shivaji Narsappa Vengane (son)
Age : 65 Years, Occ. Agri.
R/o. Village Wathwada, Tq. Kalamb
Dist. Osmanabad.

... APPELLANT
(Org. Defendant No.1)

VERSUS

1. Appasaheb s/o Omprakash Ghugare
Age : 26 years, Occ. Business
R/o. Manthale nagar, Latur. Orig. Plaintiff
2. Sou. Kashibai W/o Santram Kotwal
Age : 60 years, Occ. Agri.
R/o Harangul (Bk.) & Dist. Latur.
3. Sudatta s/o Tukaram Dange,
Age : Major, Occ. Agri.
R/o Near Varad Photoworks Home,
Ram Galli, Latur Tq. & Dist. Latur.
4. Anand s/o Ramrao Khadkikar
Age : Major, Occ. Business,
R/o Kamalkunj, Vishnudasji Bhutda Building,
Near Maheboob Suhani Darga,
Balaji Mandir Road, Latur.
5. Uttam s/o Kashinath Talne
Age : Major years, Occ. Business,
R/o. Suyog Bhavan Omshanti Nagar,
Near Spinning Mills,
Bhavani chowk, Latur.
6. Anand s/o Ganpatrao Rampure,
Age : 43 years, Occ. Business

R/o Shivkrupa Colony Old Ausa road,
Latur.

7. Anant @ Balasaheb s/o Baburao Mirajdar,
Age : 43 years, Occ. Service,
R/o Bhagya Nagar, Latur.
8. Vasant s/o Venkatrao Gargate,
Age : 65 years, Occ. Retired,
R/o Govt. Colony, Latur.
9. Kasturbai w/o Rajendra Jadhav
Age : 62 years, Occ. Household
R/o Panchayat Samiti quarters,
Old Ausa Road, Latur.
10. Vijaya w/o Jagdeo Patil
Age : 57 years, Occ. Household
R/o Yeshwant Nagar, Old Ausa Road,
Latur.
11. Pundlik s/o Ramrao Kamble
Age : 57 years, Occ. Service,
R/o Khorli Galli, Latur.
12. Anil s/o Pundlik Kamble
Age : 35 years, Occ. Education,
R/o Khorli Galli, Latur.
13. Rahul s/o Tatyarao Patil
Age : 42 years, Occ. Service,
R/o Adarsh Colony, Latur.
14. Deepak s/o Chandrakant Kulkarni
Age : 44 years, Occ. Service,
R/o New Adarsh colony, Latur.
15. Zumberbai w/o Vishwanath Jadhav
Age : 75 years, Occ. Household,
R/o Sambhaji Nagar, Latur.
16. Raghunath s/o Hanmant Yadav
Age : 75 years, Occ. Retired,

R/o New Adarsh colony, Latur.

17. Suryakant s/o Devidas Vedpathak
Age : 63 years, Occ. Service,
R/o Shaskiya colony, Latur.
18. Jayabai w/o Sambhajirao Shevale
Age : 55 yeas, Occ. Service,
R/o Naigaon, Tq. Chakur, Dist. Latur.
19. Mahadevi s/o Amresh Patil
Age : 45 years, Occ. Household
R/o. Avanti nagar Barshi road, Latur.
20. Pradeep s/o Bharat Arthamwar
Age : 48 years, Occ. Agri.
R/o. Omerga (court) Tq. Ahmedpur,
Dist. Latur.

... RESPONDENTS

(Orig. Plaintiff/ Deft. Nos. 2 to 20)

Mr. D. P. Deshpande, Advocate for the appellants

Mr. V. D. Hon, Senior Advocate i/b Mr. A. D. Sonkawade, Advocate
for respondent No.1

Mr. S. V. Natu, Advocate for respondent Nos. 3 and 4

Mr. M. L. Dharashive, Advocate for respondent No. 5

CORAM : R. M. JOSHI, J.

RESERVED ON : 15/03/2023

PRONOUNCED ON : 27/03/2023

JUDGMENT :-

1. Appellant is the original defendant No.1 being aggrieved by judgment and decree dated 23/11/2016 passed in Reg. Civil Appeal No. 90/2012 by Ad-hoc DJ-1, Latur, confirming judgment and decree dated 23/08/1996 passed in Spl. Civil Suit No. 9/1994 by 2nd Jt. CJSD, Latur, decreeing the suit of plaintiff for specific performance

of the contract and possession of the suit property.

2. Suit for specific performance of contract is filed by the plaintiff with the contention that the defendant No.1 is the owner of the suit land ad-measuring 3 H 9 Are from gut No. 99 at village Harangul (Bk.), Tq. & Dist. Latur. The entire gut no. 99 was owned by Parubai, mother of defendant Nos.1 and 2 who died on 09/07/1991. On her demise defendant Nos. 1 and 2 being her daughters became owners of the said land. It is further case of the plaintiff that defendant No.1 was in the need of money and also was unable to cultivate the land, which came to be her share, she decided to sell the same at the rate of Rs.46,750/- per acre. Defendant No.1 received earnest money of Rs.51,101/- at the time of execution of agreement to sale dated 06/05/1992. The defendant No.1 was under obligation to get the land demarcated and to produce no due certificate for the purpose of execution of sale deed. It is also contended by the plaintiff that defendant had received further amount of Rs.12,676/- and as such total sum of Rs.1,12,766/- was received by her. Plaintiff also claimed that since the defendant No.1 failed to perform her part of contract, notice dated 16/12/1993 was issued by RPAD and a public notice was also issued on 18/12/1993 in a local newspaper. On these averments suit for specific performance of the contract is filed.

3. Defendant No.1 filed written statement at Exhibit 28. This defendant did not dispute execution of agreement to sale dated 06/05/1992 and also receipt of earnest amount at Rs. 51,101/-. She however denied to have agreed to measure suit land and to get it demarcated. She further admits the receipt of additional amount of Rs.49,000/- from plaintiff. It is claim that the defendant No.1 has sold the other part of the land for Rs.75,000/- per acre. It is alleged that the plaintiff has failed to perform his part of the contract. She however agreed to refund sum of Rs.1,01,101/- to plaintiff.

4. Defendant No.2 filed written statement at Exhibit 33 admitting the ownership of defendant No.1 over the suit land but denied its boundaries.

5. On the basis of pleadings learned Trial Court framed issues at Exhibit 44. The initial burden was placed on the plaintiff to prove that there was agreement to sale between the parties and that defendant No.1 agreed to get the land measured and demarcated. Plaintiff was also called upon to prove his readiness and willingness to perform his part of the contract and payment of part consideration to defendant. On behalf of the plaintiff his father Omprakash led evidence at Exhibit 56 and testimony of Shantvir (Exhibit 72) was also recorded. Plaintiff has placed reliance of documentary evidence

(Exhibits 57 to 71 and 73). Defendant No.1 Shalubai examined herself (Exhibit 77) and also led evidence of Uttam (Exhibit 79). Defendant No.2 did not lead any evidence.

6. There is no dispute about the ownership of defendant No.1 over the suit land and she executing agreement to sale dated 06/05/1992 (Exhibit 58). She has further admitted receipt of the earnest money of Rs.51,101/- on the date of the execution of the agreement and in all having received a sum of Rs.1,01,101/-. In view of these admitted facts plaintiff was required to prove that the defendant No.1 had agreed to get the land measured and to issue no due certificate before executing sale deed. In this regard though there is denial of defendant No.1 to the said clause however where perusal of Agreement to sale (Exhibit 58) indicates that in candid terms defendant No.1 had agreed to get the land measured and demarcated and also to issue no due certificate. Plaintiff by examining Uttam has proved the intention of the parties and the obligation on the part of defendant No.1 to found this part of the contract. Thus it is proved that before executing sale deed, it was obligatory on the defendant to get land measured and also to issue no dues certificate.

7. Learned counsel for the appellant states that plaintiff

himself has not entered the witness box but his father was examined as a witness on the basis of power of attorney were relying upon the judgment in the case of ***Janki Vashdeo Bhojwani & Anr vs Indusind Bank Ltd. & Ors, (2005) 2 SCC 217***, it is argued that the witness could not have led evidence on behalf of plaintiff and hence it must be held that plaintiff has failed to prove his case. In this regard it is material to note that the Hon'ble Apex Court in the said judgment (cited supra) has held that the constituted attorney may depose the acts done by him pursuant to the power given to him by the principal. This does not prevent the witness to lead evidence of facts based on his personal knowledge. Here in this case the witness is the father of the plaintiff and has clearly stated about his knowledge about the entire transaction in fact it is specifically stated that for the purpose of payment of final consideration he was having money with him. Defendant on the other hand was unable to show that the witness had no personal knowledge about the transactions. Plaintiff, thus has not only pleaded his readiness and willingness to perform his part of the contract, but has proved the same with cogent evidence. In considered view of this Court the both learned Trial Court as well as First Appellate Court have rightly accepted evidence of this witness for the purpose of proof of the fact about readiness and willingness of the plaintiff to perform his part of

the contract.

8. Next contention of the learned counsel for the appellant is that there is delay caused in filing of the suit and that the time was the essence of the contract. At the outset it needs to be recorded that the law on the point of whether time is essence in case of sale of immovable property is well settled by the catena of judgments of the Hon'ble Apex Court. It is trite law that in case of the agreement to sale immovable properties, unless recital thereof clearly indicates such intention of the parties, time is never essence of the contract. In the present case the conditions of the contract agreed upon by parties indicate that there was an obligation on the defendant No.1 to get the land measured and demarcated and also to issue no due certificate. It nowhere even remotely shows intention of parties to make time as essence of contract. Thus, till the compliance of the said part of the contract by defendant No.1, no cause of action arose for the plaintiff to seek execution of sale deed from her. The evidence on record indicates that it was the plaintiff who had approached to the defendant for seeking execution of sale deed and issued notice dated 16/12/1993 by registered A.D. to defendant No.1 and also issued public notice in the local newspaper on 18/12/1993. The conduct of the plaintiff, therefore, shows that he was always interested in seeking sale deed from defendant No.1. Thus, this Court

finds no substance in the submissions made by the counsel for the appellant with regard to time being essence of contract. Moreover there is no dispute about the fact that suit filed by the plaintiff is well within limitation.

9. Defendant No.1 has claimed that she has sold the portion from total land to other purchasers for consideration @ Rs.75,000/- per acre. Meaning thereby the defendant claims that the consideration in the present transaction is inadequate. Section 20 of the Specific Relief Act as it stood prior to the amendment and as applicable to the present case, shows that inadequacy of the consideration shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship with the meaning of clause (b). The defendant except for making a bold statement that she has sold the part of the land at Rs.75,000/- per acre, made no other averments in order to show as to how the plaintiff has taken any unfair advantage of her or the hardship which is likely to be caused to her by directing specific performance of contract. Learned Trial Court in its judgment has elaborately dealt with the said issue keeping in mind relevant provision and recorded findings thereon. The First Appellate Court has rightly upheld the said findings. Both Courts below therefore have not erred in drawing conclusions as recorded in impugned judgments.

10. The record indicates that during the pendency of R.C.A. No. 90/2012 it was sought to be placed on record that the defendant No.1 has sold 5 acre lands from the suit land to Uttam and it was canvassed before the First Appellate Court that he is necessary party to the suit. The judgment of the First Appellate Court clearly shows that the said aspect was considered and findings are recorded thereon. According to First Appellate Court Uttam is found to be signatory to the agreement to sale (Exhibit 58). Thus, even if he has purchased the portion of the suit property during the pendency of the suit, he could not be considered as bonafide a purchaser without notice. Apart from the fact that he is not the bonafide a purchaser, in view of the Section 52 of the Transfer of Property Act the purchaser if any would be bound by the decree since his transaction is during the pendency of the lis.

11. Consideration of the material evidence on record and the judgments of both Courts below show that they committed no error whatsoever in appreciating the relevant evidence on record and the law concerning to the issues involved in the present proceedings and granting decree of specific performance of contract.

12. The appellant has filed Civil Application No. 123/2018 in this appeal for production of additional evidence under Order 41 Rule

27 of CPC before this Court. Order 41 Rule 27 of CPC empowers the Appellate Court to record additional evidence. Order 41 Rule 27 of CPC reads thus:

"27. Production of additional evidence in Appellate Court.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever, additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

13. No doubt this provision enables the Appellate Court to allow parties to produce additional evidence whether oral or documentary, but the same is permissible if it satisfies the required conditions enumerated therein. The said provision is clothed negative wording to start with "the parties to an appeal shall not be entitled to produce additional evidence" but the Appellate Court may allow such evidence or document to be produced or witness to be examined in

strict compliance of clause (a), (aa) and (b) stated above. This makes amply clear that the parties shall not be entitled to produce additional evidence unless the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not after the exercise of due diligence be produced by him when the decree appeal against was passed.

14. In view of the aforesaid provision the basic condition for entertaining application would be that the applicant specifically pleads to indicate due diligence and has to state when the additional evidence now sought to be placed on record came to his knowledge. Perusal of application of Appellant herein shows that no specific pleadings as to when the fact about the minority of plaintiff came to the knowledge of the appellant. It is vaguely stated in the application that recently appellant came to know about the birth date of the plaintiff from the villagers and therefore, approached the lawyer informing to him about the same. On his advise extract from the high school where the plaintiff has taken education is obtained on 06/02/2017. Thus, the appellant has failed to disclose exactly about her knowledge as to age of the plaintiff. It is settled position of law

that powers under Order XLI Rule 27 of CPC cannot be exercised causally and unless the applicant shows due diligence, such evidence cannot be permitted at this stage more particularly in Second Appeal.

15. The appellant gives reason that she is illiterate and rustic lady and therefore, the evidence was not produced before the Trial Court or First Appellate Court. It is relevant to note that the appellant was duly represented by lawyer before both Courts below. Thus, she cannot be allowed to take the shelter of her illiteracy for not taking on record before Trial Court or First Appellate Court the evidence which now sought to be brought before this Court.

16. Apart from this it is also necessary to take note of the fact that though appellant claims agreement to sell being void on account of minority of plaintiff but nowhere in the written statement defendant No.1 has claimed that plaintiff was a minor on the date of agreement to sell or filing of suit. The issues sought to be raised by the appellant in this appeal is not pure question of law but is a mix question of fact and law. In order to substantiate her contention about the minority of the plaintiff, there ought to have been pleadings to that effect in the written statement. In absence of pleadings any amount of evidence led by the appellant in that regard would be of no consequence. Thus, even otherwise no purpose is

likely to be served by allowing the Civil Application No. 123/2018,

17. The sum and substance of the aforesaid discussion is that the appellant has failed to show involvement of any substantial question of law in this appeal. Hence the order.

ORDER

- (i) Second Appeal is dismissed with costs.
- (ii) Civil Application No. 123 of 2018 is dismissed with costs.
- (iii) Pending civil applications, if any, stand disposed of.

(R. M. JOSHI, J.)

ssp