

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

SECOND APPEAL NO.152 OF 2023
WITH CA/3581/2023 IN SA/152/2023

JITENDRA MANOHAR SONAR
VERSUS
HEMANT BHAU YEOLE

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Advocate for Appellant : Mr. Savale Amit S

CORAM : R.M. JOSHI, J.
DATE : 13th April, 2023

PER COURT :

1. Heard.
2. The Second Appeal is preferred by defendant no. 2 in RCS No. 43/2012, against the judgment of the first appellate Court dated 19.11.2022, in RCA No. 22 of 2019, whereby, the judgment and decree passed by the Trial Court was set aside and the suit for specific performance of contract was decreed.
3. Appellant is defendant no. 2 in RCS No. 43 of 2012. It is the case of plaintiff that defendant no. 1 has undivided share in the suit house and he agreed to sale his undivided share to the plaintiff by executing agreement dated 23.06.2010 and accepting earnest amount of Rs. 50,000/-. The balance amount of Rs. 3,50,000/- was to be paid till the end of December, 2010. Plaintiff has further pleaded that he

was always ready to perform his part of contract and he insisted the defendant no. 1 for execution of sale deed. But since defendant no. 1 delayed the execution, he issued notice dated 05.12.2010 calling upon defendant no. 1 to execute the sale deed. Since the plaintiff realized that defendant no. 1 will not execute the sale deed, suit came to be filed.

4. Defendant no. 1 filed his written statement challenging the right of the plaintiff to file suit. He, however, admitted the execution of agreement to sale dated 23.06.2010 with the contention that it was within his right to cancel the said agreement. Defendant no. 1 has also given explanation for the execution of the said agreement by stating that due to financial difficulties, the said agreement was entered into and he admits about the notice given by plaintiff being replied on 24.09.2010. Defendant no. 1 further claims that he never intended to cheat plaintiff and he is ready to refund the amount of Rs. 50,000/- to the plaintiff.

5. Defendant no. 2 though is not signatory to the agreement to sale, however, he being a co-sharer of the suit house, was joined as a party defendant and in his written statement, he claimed that the suit property belongs to their father and after the marriage of defendant no.

1, he insisted for separate residence. It is contended that the suit house is indivisible. It is his contention that in order to avoid family dispute defendant no.1 executed sale deed in favour of defendant no. 2 on condition that he will look after their parents.

6. Learned Trial Court by passing judgment and decree has directed the refund of earnest amount of Rs. 50,000/-along with interest at the rate of 6% per anum. It is observed by he learned Trial Court that the plaintiff has failed to show his readiness and willingness to perform his part of the contract. The said findings are reversed by the first appellate Court and the decree of specific performance is granted.

7. Learned counsel for appellant / defendant no. 2 states that though, he is not the party to the agreement to sale, however, he has a right to challenge the findings recorded by the first appellate Court with regard to the readiness and willingness of the plaintiff. To support said submission, he placed reliance upon the judgments of the Hon'ble Apex Court in the case of *Ram Awadh (dead) by Lrs Versus Achhaibar Dubey*, reported in **2000 (2) ALL MR 565** and *Kadupugotla Varalakshmi Versus Vudagiri Venkata Rao and others*, reported in **2021 (2) R.C.R.(Civil) 246**.

8. Though, defendant no. 1 is not signatory to agreement to sale but as it is obligation of Court to ensure before grant of decree of specific performance of contract that there is pleading and proof of readiness and willingness to perform the part of the contract by the plaintiff, it is open for any defendant to the suit to challenge the said findings. Thus, the contention of the counsel for the defendant no. 2 in this regard needs to be considered.

9. There is no dispute about the fact that it is pleaded by the plaintiff about his readiness and willingness. Similarly, in testimony, it is categorically stated that he was ready and willing to perform his part of contract and to get sale deed executed. Plaintiff was subjected to cross-examination, however, there is no suggestion made during his cross-examination controverting his evidence about readiness and willingness in any manner whatsoever. On the contrary, cross-examination of the plaintiff, reveals that he has his own house and he is in the business of cold water plant. His admissions need to be considered in the context of the written statement of defendant no. 1, wherein, he states that on account of the financial difficulties of defendant nos. 1 and 2, the agreement to sale came to be executed and amount of Rs. 50,000/- was received. Plaintiff after realizing that defendant no. 1 is delaying the execution of sale deed, has issued

notice to him. Defendant no. 1 in his written statement has stated about replying the said notice. The cumulative effect of the pleadings and evidence on record of the plaintiff is sufficient to hold plaintiff's readiness and willingness to perform his part of the contract.

10. No doubt the judgment cited on behalf of the learned counsel for the appellant / defendant no. 2 in case of *U.N. Krishnamurthy (Since Deceased) Through LRs. Versus A.M. Krishnamurthy*, reported in **2022 AIR (SC) 3361**, laid down the general principle of law that it is the duty of the plaintiff to plead and prove the readiness and willingness to perform his part of the contract and that such readiness and willingness must exist at all stages. This, however, cannot be construed to say that in cases where the defendant even does not challenge the evidence of the plaintiff about readiness and willingness, he is required to prove that he was ready with actual amount to make payment of the consideration. In respectful view of this Court, this judgment would not be useful for defendant no. 2 to support his arguments.

11. Here, in this case since defendants did not challenge the readiness and willingness of the plaintiff to perform his part of the contract, nothing further remained to be proved by the plaintiff.

12. The Trial Court has failed to consider the evidence led by plaintiff in this regard. The First Appellate Court has reversed the said findings by giving due consideration to the evidence placed on record. In such circumstances, this Court does not find any perversity in the findings recorded by the first appellate Court with regard to the readiness and willingness of plaintiff to perform his part of contract.

13. Learned counsel for the appellant defendant no. 2 has sought to assail the right of defendant no. 1 to execute sale deed in respect of the undivided share in the house property in favour of the plaintiff, who is a stranger. In order to support his contention, he placed reliance on Section 44 of the Transfer of Property Act (For short 'the Act'), in particular the second part of the said provision. To support his contentions, he also relied upon judgment of the Hon'ble Apex Court in the case of *Dorab Cawasji Warden Versus Coomi Sorab Warden*, reported in **1990 (2) SCC 117**.

14. It would be relevant to consider Section 44 of the Act, which reads thus :

“44. Transfer by one co-owner.—

Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any

interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

15. Perusal of the provision of Section 44 of the Act, shows that it does not create a bar for alienating the undivided share in the joint family property. The second part of the provision, however, clarifies that in case of a dwelling house unlike the land, the purchaser cannot claim the right as a co-sharer to claim joint possession thereof with others. The perusal of the judgment of the Hon’ble Apex Court also abundantly clarifies the said position. Relevant observations of Apex Court read thus :

“If in this state of things, a member of the family transfers his share in the dwelling house to a stranger paragraph 2 of Section 44 of the Transfer of

Property Act comes into play and the transferee does not become entitled to joint possession or any joint enjoyment of the dwelling house although he would have the right to enforce a partition of his share. The object of the provision in Section 44 is to prevent the intrusion of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share therein in favour of a stranger. The factual position as has been determined is that the property is still an undivided dwelling house, possession and enjoyment whereof are confined to the members of the family. The stranger-transferees being debarred by law from exercising right of joint possession which is one of the main incidences of co-ownership of the property should be kept out.”

16. This judgment, therefore, does not lay down proposition of law that undivided share in the dwelling house cannot be sold. This Court, therefore, finds no substance in the submissions made in that regard.

17. The contention of the defendant no. 2 that inconvenience would be caused to the defendant no. 2 and the family members cannot be taken into consideration, because unless the purchaser of the undivided share goes for partition he cannot share household. At this

stage, the said issue has no bearing to decide the right of the parties to seek sale deed in respect of the undivided share in house and to pass decree of specific performance of contract.

18. In view of the aforesaid discussion, no substantial question of law is found involved in this appeal. In the result, appeal stands dismissed with costs.

[R.M. JOSHI, J.]

SPChauhan