

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.505 OF 2023
WITH
INTERIM APPLICATION NO.14496 OF 2023
IN
SECOND APPEAL NO.505 OF 2023**

Mr. Manik Shankar Tarange and Ors. Appellants
V/s
Bapu Bhanudas Kale Respondent.

Mr. Abhijit Kulkarni @ Chinmay Patil for the Appellants.
Mr. C.G. Gavnekar @ Rohit Parab i/b Milind Deshmukh for the
Respondent.

CORAM : VINAY JOSHI, J.

DATE : SEPTEMBER 15, 2023

P.C.:-

1] This is defendants' second appeal challenging the decree of specific performance passed by the Trial Court, and confirmed by the first appellate court. Defendants have challenged the legality and sustainability of the impugned orders by canvassing that description of the suit property is incorrect, readiness and willingness has not been proved, subsequent purchaser is a bonafide purchaser for value without notice, wrong exercise of discretion, non-joinder of necessary

parties and absence of claim of declaration about subsequent sale deed.

2] Facts in brief are that the suit property i.e an agricultural land was initially owned by four brothers viz. Mahadeo, Manik, Anna and Biru. Defendant No.1 Manik vide registered agreement dated 28.10.1996 agreed to sell his share to the plaintiff admeasuring 1 H. 60 R for total consideration of Rs 20,000/-, out of which he received substantial consideration of Rs 19,000/- at the time of agreement. Likewise, Anna and Biru (defendant Nos. 2 and 3) also agreed to sell their share admeasuring 3 H. 20 R vide even dated registered agreement for consideration of Rs 37,500/- which they received on the date of the agreement itself. The suit land situates within the command area of Nira-Devdhar Dam and thus it requires permission to sell from the competent authority. In the course of time, competent authority has removed restriction on sale on which Plaintiff requested defendant Nos. 1 to 3 to execute Sale Deed, however, they avoided. Plaintiff had also issued legal notice dated 18.02.1999 calling upon the defendants to execute the Sale Deed but they did not. Hence, suit

for specific performance.

3] Defendants took multiple defences to avoid decree of specific performance. Though execution of agreement was admitted, however plea was taken that agreement was towards security for money advanced. It is contended that the suit property was not properly described and therefore decree of specific performance cannot be granted. It is defendants' contention that prior to the institution of the suit already suit property was alienated by defendant Nos. 1 to 3 in favour of defendant Nos. 4 to 6 and thus it is impossible to grant specific performance. To be more specific, it is stated that 4th brother of Defendant Nos. 1 to 3 had filed RCS No.259/1997 for partition and separate possession. In the said suit, compromise decree was passed by which share of defendant Nos. 1 to 3 was assigned to defendant Nos. 4 to 6 who are their wives. Thus without seeking declaration to set aside the said compromise decree, the suit is not maintainable. It is contended that on 05.11.1999 defendant Nos. 4 to 6 have alienated the suit property in favour of stranger purchasers i.e. defendant Nos. 7 and 8 and thus without seeking declaration that said Sale Deed is null

and void, suit is not maintainable. Moreover, it is contended that defendant Nos. 7 and 8 are bonafide purchasers for value without notice, therefore discretionary relief of specific performance could not have been granted by both the courts below.

4] Trial Court has framed necessary issues at Exhibit-23. It was held that Plaintiff has duly established execution of registered agreement to sell, and his readiness and willingness to perform his part of contract. It is held that hardship would be caused to the Plaintiff in case of refusal of decree and thus decree for specific performance was passed. Trial Court negated defendants' contention that stranger purchasers were bonafide purchaser for value without notice. Trial Court held that partition decree was collusive one, which would not bind the Plaintiff.

5] Initially, it has been argued that description of the suit property is incorrect. However, record indicates that no such plea was raised by the defendants in the Trial Court and thus no issue to that effect was framed. Perusal of both registered agreements to sell indicates

that suit property has been specifically described and the performance is to be granted on that basis, therefore issue of incorrect description is unacceptable. Though in Trial Court, nature of document has been challenged, however no arguments have been advanced to that effect. Moreover, both the even dated agreements are registered documents of which execution is admitted. Therefore concurrent finding of fact holding that it was a transaction of agreement to sell, calls for no interference.

6] It is strenuously argued that Plaintiff has failed to prove readiness and willingness which is an essential requirement to grant decree of specific performance in term of Section 16 (c) of the Specific Relief Act. It has to be noted that suit agreements were executed on 28/10/1996. After removal of restriction, within stipulated period Plaintiff has issued suit notice dated 18.02.1999 calling upon the defendants to execute the Sale Deed. Not only that, Plaintiff has called the defendants to the office Sub-Registrar to execute the Sale Deed without fail. Pertinent to note that as regards to one of the agreement, only balance amount was of Rs 1,000/- whilst towards

another agreement entire consideration was already paid. Thus nothing substantial remains to be performed on the part of the Plaintiff. It is evident that legal notice was issued on 18.02.1999 whilst on defendants' failure, in close proximity on 05.04.1999 suit has been filed. Thus by any stretch of imagination, it cannot be said that Plaintiff was not ready and willing to perform his part of contract.

7] One another prominent stand taken by the defendants is regarding rights of stranger purchasers. It is contended that by virtue of partition decree, defendant Nos. 4, 5 and 6 became owner of the suit property which they had alienated to defendant Nos. 7 to 8 vide Sale Deed dated 5.11.1999. According to stranger purchasers, they were unaware about earlier transaction and their sale was for valuable consideration. Pertinent to note that suit was instituted on 05.04.1999 whilst during pendency of suit i.e. on 5.11.1999 suit property was alienated. Therefore, principle of *lis pendens* would apply in the case.

8] So far as partition decree dated 19.01.1997 is concerned, both the courts below concurrently held that it was collusive one.

Admittedly, Plaintiff was not party to the said suit. One of the brother viz Mahadeo has filed the said suit without cause of action. Trial Court in para 22 of its judgment has exhaustively dealt with the issue that there was no cause of action for filing the suit for partition. Moreover, defendant Nos. 4 to 6 were not the co-sharers but defendant Nos. 1 to 3 who were brothers have alienated their share in favour of their respective wives. Thus, it is apparent that in order to avoid decree of specific performance, with malafide intention, three brothers have transferred their share which is not a genuine transaction. Thus, said decree which was passed by joining hands amongst the family members would not come in the way of this suit.

9] It is argued that Plaintiff has made alternative prayer for refund of earnest amount and therefore Trial Court ought to have granted alternative relief. In support of said contention, reliance is placed on the decision of the Supreme Court in the case of **Kanshiram vs. Om Prakash Jawal and others** (1996) 4 SCC 593 wherein alternate relief of damages was granted on the basis of facts of that case. No legal proposition is laid in the said case to say that whenever alternate relief

is claimed, Court shall not pass decree of specific performance. This is a suit for specific performance pertaining to immovable property. Explanation (i) to Section 10 of Specific Relief Act, states that breach of contract to transfer immovable property cannot be adequately relieved by paying compensation. Therefore the said contention about grant of alternate relief is wholly untenable. Besides that, no other ground has been agitated to refuse the discretionary relief of specific performance.

10] To the last it is argued by the Appellants that the suit would fail in absence of challenge to the subsequent alienation. To substantiate said contention reliance is placed on the decision of the Supreme Court in the case of *I.S. Sikandar (Dead) by LRs vs. K. Subramani and others* (2013) 15 SCC 27. In the said decision, agreement to sell was terminated and in that scenario, it was held that such declaration ought to have been claimed. On the other hand, Respondent's learned Counsel was relying on the decision of this Court in the case of *Dilip Bastimal Jain vs. Baban Bhanudas Kamble and others* 2001(3) Mh.L.J 730 would submit that there is no necessity to seek specific

declaration against the subsequent transferee. In the said case, this Court by relying on the earlier decision of Supreme Court has observed that subsequent transferee is a necessary party but specific declaration pertaining to his transaction is not required. Therefore said contention is not tenable on legal touchstone.

11] Considering rival submissions, it reveals that defendants fought tooth to nail to save land from specific performance. Attempts were made to avoid performance by obtaining collusive partition decree as well as by alienating suit property during pendency of suit. In the scenario, it is evident that both the Courts have properly considered all the aspects and thus no substantial question of law emerges for adjudication. In view of above, appeal stands dismissed. Pending Civil Application is disposed of.

(VINAY JOSHI, J.)