

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

SECOND APPEAL NO. 217 OF 2015

Sunil S/o Ramchandra Mahajan
Aged about 55 Years, Occ.: Advocate
R/o Mahajan Market, Sitabuldi,
Nagpur

...Appellant

// VERSUS //

Sudhir S/o Gulabrao Malode
Aged about 47 Years, Occ. : Advocate
R/o 'Samruddhi', 110, Doye Layout,
Opp.Datta Mandir, Zingabai Takli,
Nagpur 440 030

... Respondent

Shri Anand Jaiswal, Senior Advocate h/f Shri Rohit Sharma, Advocate for the appellant.

Shri S.P.Bhandarkar, Advocate for the respondent no.1.

CORAM : ANIL S. KILOR, J.

DATED : 20th APRIL, 2023.

ORAL JUDGMENT :

This appeal takes exception to the judgment and decree dated 17th October, 2014, passed by the Adhoc-District Judge-3, Nagpur in Regular Civil Appeal No. 343 of 2010, allowing the appeal and thereby setting aside the judgment and decree dated 20th April, 2010 passed by the 3rd Joint Civil Judge, Senior Division, Nagpur, in Regular Civil Suit No. 1234 of 2004 (New Special Civil Suit No. 905 of 2007), dismissing the suit for specific performance.

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

The respondent is the plaintiff who filed a suit for specific performance. It is the case of the plaintiff that he is a practicing Advocate at Nagpur. Defendant is also a lawyer. They had close friendship with one another. Defendant is an exclusive owner of suit block admeasuring carpet area 110 square feet.

3. It is stated that on 27th November, 1991 defendant entered into oral agreement of sale of suit block with plaintiff for valuable consideration of Rs.70,000/-, in presence of their common friends. Having regard to the friendly relations, mutual understanding as well as in part performance of oral agreement, defendant put up plaintiff in physical possession of suit block on 28th November, 1991. Since then plaintiff is running his office-cum-consultation chamber at suit premises.

4. Plaintiff contended that the defendant agreed upon to accept consideration amount in installments. Plaintiff paid him first five installments by cheque each of Rs.5,000/-. Thereafter for 17 times and in piece meal the plaintiff paid balance consideration amount to the defendant by cash.

5. The defendant acknowledged cash amount by signing against the same. Thus, entire consideration was of Rs.70,000/- was paid to the defendant by plaintiff till 22nd March, 1998. Thereafter plaintiff, with the knowledge of defendant, carried out renovation of said block by spending Rs.45,000/-. Even defendant had also given extension of EPDAX of defendant's hotel to plaintiff's telephone.

6. Plaintiff was looking after various civil and criminal matters filed by the defendant and his family members before different Courts. During the said period, plaintiff came across with special civil suit no. 900 of 1994 and observed that entire “G-Building” was mortgaged to State Bank of India by way of collateral security to secure the cash credit facility of M/s Bild Fast Construction, a proprietary concern of defendant’s younger brother Mr. Ramesh Ramchandra Mahajan. Said suit was compromised in the year 1988 before 2nd Joint Civil Judge, Senior Division, Nagpur but said encumbrance, by way of mortgage, was not removed by State Bank of India, Ramdaspath branch by getting deed executed and by issuing no dues and no encumbrance certificate as defendant has not persuaded the said matter with the bank. It was issued some time in October and November, 2002.

7. The defendant was avoiding to execute the sale deed without any reason. Hence plaintiff issued request letter-cum-notice to the defendant on 24th May, 2004 to convey suitable date for execution of sale deed of suit block in favour of plaintiff. Defendant replied the said notice which was received by the plaintiff on 10th June, 2004, falsely claiming that plaintiff was tenant on monthly rent of Rs.2500/- in the suit block. There was no oral contract of sale. Defendant also contended that he had accepted the amount from plaintiff towards interest free security deposit and rent. Hence, plaintiff had filed the suit.

8. The defendant/respondent filed his written statement denying the claim of the plaintiff. He admitted the ownership of suit

block. He also admitted that plaintiff is in occupation of suit block as described by the plaintiff and using it as office-cum-consultation chamber. He admitted that he had received Rs.70,000/- from plaintiff.

9. Defendant pleaded that since they had good relations and since plaintiff was looking after family litigation and near about 25 court cases, he had allowed to occupy suit block in the capacity of tenant only. He had accepted the amount by cheque from plaintiff and then by cash initially towards interest free security deposit and then towards rent and thereafter towards arrears of rent. He contended that he adjusted rest of the amount in the fees of plaintiff towards looking after his litigation. He contended that since the year 2001, plaintiff failed to pay rent. He denied that there was any contract of sale and plaintiff's fulfilling it. He denied that he had committed the breach of contract as alleged.

10. The learned trial Court after scrutinizing the oral as well as documentary evidence was pleased to dismiss the suit vide impugned judgment and decree dated 20th April, 2010.

11. The plaintiff feeling aggrieved by the same preferred an appeal vide regular civil appeal no. 343 of 2010 which came to be allowed in favour of the plaintiff by decreeing the suit, vide judgment and decree dated 17th October, 2014, the same is the subject matter of the present appeal.

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

13. This Court vide order dated 1st February, 2023 has framed the following substantial questions of law:

i. Whether the learned appellate Court was justified in holding that plaintiff has proved the execution of the alleged oral agreement in the facts and circumstances of the case and therefore was entitled for specific performance ?

ii. Whether the learned appellate Court committed a grave error in ignoring the settled principles of law that “the plaintiff has to stand on his own legs and cannot take advantage of the lacunas in the defence”. Therefore, whether in view of the said principle and in the facts and circumstances of the case, the plaintiff has failed in proving execution of any oral agreement and therefore not entitled for any relief as prayed for?

iii. Whether the learned appellate Court was justified in completely shifting the burden to prove the nature of transaction on the defendant rather than the plaintiff in the facts and circumstances of the case and contrary to the settled principles and provisions of Evidence Act?

iv. Whether the learned appellate Court was justified in reversing the judgment of the learned trial court and failing in its duty to observe the principles and law laid down by the Honourable Apex Court while delivering judgment of reversal?

14. Shri Jaiswal, learned Senior Advocate for the appellant submits that without recording justifiable reasons and even without

arriving at a definite conclusion that there was an oral agreement, the judgment and decree passed by the trial court dismissing the suit filed by the plaintiff for specific performance, has been reversed.

15. It is further submitted that specific relief is discretionary and it is settled law that discretion must be exercised judiciously. It is pointed out from the findings recorded by the learned Lower Appellate Court that only on the basis of two facts namely payment of Rs.70,000/- and handing over of possession, in absence of any cogent evidence about oral agreement, the decree for specific performance was passed. It is therefore submitted that the impugned judgment and decree suffers from perversity. In support of his contention, learned Senior Advocate for the appellant has placed reliance of the Hon'ble Supreme Court of India in the case of *Ganesh Shet Vs. Dr. C.S.G.K. Setty and others*,¹ in the case of *Brijmohan and others Vs. Sugra Begum and others*² and *Coordinate Bench of this Court in the case of Pravin D. Thakker HUF and others Vs. Rita J. Shah and another*³

16. On the other hand, Shri Bhandarkar, learned counsel for the respondent supports the impugned and decree and argues that in this case there was an oral agreement and it was established by proving the

1. 1998(5) SCC 381

2. 1990 (4) SCC 147

3. 2020(3) Mh.L.J 341

payment of Rs.70,000/- and further the fact of handing over of possession of the suit block to the plaintiff.

17. It is submitted that the learned Lower Appellate Court has rightly shifted the burden of proving tenancy on the defendant which he failed to prove and therefore, Court has rightly held that there was an oral agreement. He further submits that as the findings recorded by the learned lower Appellate Court are based on oral as well as documentary evidence, there is no perversity in the findings recorded by the first appellate Court in favour of the plaintiff. He accordingly prays for dismissal of the present appeal. In support of his contention, he has placed reliance of *Chandrabhan (Deceased) through Lrs and others vs. Saraswati and others*⁴, *Tribhuvanshakar Vs. Amrutla*⁵, *Smt. Sumati Naik Vs. Shri Dilip Fatarpekar*⁶, *Dnyaneshwar Ranganath Bhandare Vs. Sadhu Dadu Shettigar*⁷

18. In light of rival contentions of both the parties, I have perused the record and the impugned judgment and decree.

19. It is evident from the record that it is the case of the plaintiff that there was an oral agreement between the plaintiff and defendant, entered into on 27th November, 1991 for sale of suit block for total consideration of Rs.70,000/-. It is further case of the plaintiff that in part

4. 2022 SCC Online SC 1273

5 2014(2) SCC 788

6 1999(3) BomCR 597

7 1990(4) SCC 147

performance of said oral agreement he was put in physical possession of the suit block wherein he is running his office-cum-consultation chamber since 28th November, 1991. It is the further case of the plaintiff that he paid amount towards consideration on various dates and receipt of the payment made in cash was acknowledged by defendant by signing on plaintiff's personnel diary on the date of receipt of those respective payments.

20. Contrary to this, it is the case of the defendant that they had very good relations with each other being practicing lawyers. However, he denied the occurrence of oral agreement of sale and also denied receipt of consideration amount of Rs.70,000/-. He further denied that the possession of the suit property given to the plaintiff in part performance of oral agreement. It is the case of the defendant that as the plaintiff was looking after various legal matters of the defendant and his family members, he was accommodated to have his office-cum-consultation chamber in prime commercial centrally located, in the capacity as a tenant. It is further averred that monthly rent of Rs.2500/- was agreed in between the parties.

21. It is a settled law that who asserts a particular fact it is for him to affirmatively established it. It is also a settled law the plaintiff must succeed or fail on his own case and cannot take advantage of weakness in the defendant's case to get a decree.

22. In the present matter the whole controversy revolves around a question whether plaintiff succeeded in establishing and proving that there was an oral agreement of sale of suit block ?

23. Before examining the matter on merit and answering the substantial questions of law framed by this Court, it would be appropriate to reiterate the law as regards the oral agreement.

24. The Hon'ble Supreme Court of India in the case of Ganesh Shet (Supra) while pointing out types of agreement has observed thus:

19. Fry on 'Specific Performance' (6th Ed) (PP. 298-302) deals with the exact point in issue before us. The another refers to four types of cases: (1) Where the defendant admits the contract alleged; (2) where the defendant denies the contract as alleged and the plaintiff supports his case by one witness only; (3) where the defendant denies the contract as alleged and the evidence proves a contract, but different from that alleged by the plaintiff; and (4) where the defendant denies the contract as alleged and admits another contract.

25. The Hon'ble Supreme Court of India in the above referred judgment of Ganesh Seth (supra) has further observed thus :

13. It is again well settled that, in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain.

14. In Pomeroy on 'Specific Performance of Contracts' (3rd Edn) (para 159) it is stated clearly, that a

"greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for

damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced. This quality of certainty can best be illustrated by examples selected from the decided cases....."

26. The Hon'ble Supreme Court of India in a case of Brij Mohan (Supra) has held that where the plaintiff comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiff to prove that there was a consensus *ad idem* between the parties for a concluded oral agreement for sale of immovable property.

27. It is further a well settled principles of law that even a decree for specific performance can be granted on the basis of oral contract which is valid, binding and enforceable. Under Section 20 of the Specific Relief Act, there is a judicial discretion to grant a decree for specific performance, yet the Court is not bound to grant such a relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a Court of appeal. Therefore, the discretion should be properly exercised keeping in view the settled principles of law as envisages in Section 20 of the Act (as held by the Hon'ble Supreme Court of India in the case of *K Nanjappa (Dead) by legal representatives*

Vs. R.A.Hameed alias Ameersab (Dead) by legal representatives and another)⁸.

28. The learned trial Court while dismissing the suit has observed that the plaintiff has not disclosed whether any prior talk with the defendant had taken place in respect of the transaction in question, before 27.11.1991. It has further observed that even the plaintiff has not disclosed the place where the oral agreement had taken place between the plaintiff and the defendant, and what were the terms and conditions including the time limit fixed for execution and registration of sale-deed. In absence of all such details, it cannot be said that there was a clear and definite precise understanding of all the terms between the parties and there was a concluded contract.

29. The learned trial Court has further observed that the witnesses to the oral contract are the interested witnesses and their testimony cannot be relied upon. Further there is no supporting evidence which indicate that the payment of Rs.70,000/- alleged to have made by the plaintiff, was towards total consideration of the suit block.

30. It is further held that no-objection certificate Exhibit 53 does not disclose that in the application of the plaintiff, he had stated that he was occupying the suit premises in furtherance of part performance of contract. The plaintiff has not pointed out the nexus between the figures in the diary and oral agreement in between the parties. The figures of Rs.70,000/- written in the diary is in the handwriting of the plaintiff.

⁸ (2016) 1 SCC 762

31. Moreover, the learned trial Court also observed that the alleged agreement took place in the year 1998 and for a long period upto 2004 no steps were taken by the plaintiff to get the sale-deed executed.

32. The Hon'ble Supreme Court of India in the case of *Santosh Hazari Vs. Purushottam Tiwari*⁹, has held that “while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one”.

33. Let us therefore examine now whether the Appellate Court was justified in reversing the judgment of the learned trial Court or failed in its duty to observe the above referred principles laid down by the Hon'ble Supreme Court of India.

9 2001(3) SCC 179

34. The learned lower appellate Court while reversing the judgment and decree of the learned trial Court has observed that, diary shows that there was some transaction between the plaintiff and the defendant, however, they both had not prepared any document. It is further observed that the plaintiff claimed that defendant put him in occupation of suit block. This has not been denied by the defendant. He also not denied the diary extracts and his so called signed entries on it. Hence, the learned appellate Court held the extract of diary Exh.42 is genuine and therefore, it would not be fatal for the plaintiff for non-production of the entire diary.

35. The learned lower appellate Court further observed that the payment of Rs.70,000/- is proved by the plaintiff. However, the dispute of defendant is that it was not consideration of agreement of sale but it was due to tenancy of the plaintiff. The learned appellate Court further held that two things have come on record, (1) plaintiff is put in occupation of the suit block by the defendant and (2) plaintiff had paid Rs.70,000/- to the defendant. The learned lower appellate Court, therefore, held that there was some oral contract between the parties though its nature has to be proved.

36. The learned lower Appellate Court then discussed the weaknesses of the defendant, namely that if the plaintiff failed to pay rent after 1998, how and why the defendant kept mum till the year 2004 and the Court has find it something inconsistent and abnormal on the part of the defendant. The learned lower appellate Court has observed that there was some transaction between the parties either of Agreement to Sell or

Tenancy, but since tenancy does not get proved it needs to be held as Agreement to Sell. The learned lower Appellate Court emphasized much on two things, i.e. payment of Rs.70,000/- and handing over of possession of the suit block and on the basis of the same it has been held that there was a concluded contract.

38. From the above referred observations of the learned appellate Court, it is evident that the learned lower appellate Court has given benefit of weaknesses of the defendant to the plaintiff, ignoring that no cogent and clear evidence has been brought on record by the plaintiff to establish the oral agreement.

39 Even as far as the Agreement of Sale is concerned, the Court has held it proved only because the defendant failed to prove that it was an Agreement of Tenancy.

40. The payment of Rs.70,000/- and handing over possession of the suit block are not sufficient in absence of cogent and reliable evidence, to establish the oral Agreement for Sale in this case, particularly when, it has come on record that the plaintiff and defendants were the close friends.

41. Thus, I have no hesitation to hold that the learned Lower Appellate Court has completely ignored and discarded the principles laid down by the Hon'ble Supreme Court of India in the case of Santosh Hazari (supra) while reversing the judgment of the learned trial Court.

42. The findings of the learned Lower Appellate Court is also contrary to well settled principle of law that, the plaintiff must succeed or fail on his own case and cannot take advantage of weakness in the defendant's case to get a decree.

43. The learned Lower Appellate Court also failed to appreciate that it was the burden on the plaintiff to prove with certainty that there was an oral agreement of sale suit block which the plaintiff has failed to prove in this case. The learned trial Court has rightly held that the plaintiff has not disclosed whether any prior talk with the defendant had taken place in respect of transaction in question before 27th November, 1991. Further the plaintiff has not disclosed the terms and conditions including the time limit fixed for execution and registration of sale-deed. The reversal of the decree of the trial Court by the lower Appellate Court is completely based on the weaknesses of the defendant which is not permissible.

44. As I have already held that the burden was on the plaintiff to prove that there was an oral agreement of sale of suit block, the judgment cited by the learned counsel for the respondent in the case of Tribhuvanshakar Vs. Amrutlal (supra), Smt. Sumati Naik Vs. Shri Dilip Fatarpekar (supra), Dnyaneshwar Ranganath Bhandare Vs. Sadhu Dadu Shettigar (supra) are not of any help to the respondent in this case, as the above referred judgments are on the point of burden of the landlord to prove tenancy.

45. Accordingly, I answered the substantial question of law no.1 that the learned Appellate Court was not justified in holding that the plaintiff has proved the execution of alleged oral agreement.

46. Further, I answered the substantial question of law No.2 by holding that the learned Appellate Court committed grave error in ignoring the settled principles of law “the plaintiff has to stand on his own legs and cannot take advantage of the lacunae in the defence”.

47. The answered to the substantial question of law No.3 will be that the learned Appellate Court was not justified in completely shifting the burden to prove the nature of transaction on the defendant and same is contrary to the well settled principles of law and provisions of law.

48. I answered the last substantial question of law i.e. substantial question no.4 to the effect that the learned Lower Appellate Court was not justified in reversing the judgment of the learned trial Court and failed in its duty to observe the principles of law as laid down by the Hon’ble Apex Court while delivering the judgment of reversal. Accordingly, I pass the following order.

- i. Second appeal is allowed;
- ii. The judgment and decree dated 17th October, 2014, passed by the Adhoc-District Judge-3, Nagpur in Regular Civil Appeal No. 343 of 2010 is hereby quashed and set aside and the judgment and decree dated 20th April, 2010 passed by the 3rd Joint Civil Judge, Senior Division,

Nagpur in Regular Civil Suit No. 1234 of 2004 (New Special Civil Suit No. 905 of 2007) is confirmed.

[ANIL S. KILOR, J.]