

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

SECOND APPEAL NO. 448 OF 2022

Saistabegum W/o Akbar Ali,
Aged about 55 years, Occ. Household,
R/o Ganesh Ward, Pauni, Tahsil-Pauni,
District - Bhandara

... APPELLANT

.. Versus ..

- 1) Rajkumar S/o Asaramji Mundle,**
Aged about 31 years, Occ. Doctor,,
R/o. Asagaon, Tahsil-Pauni,
District - Bhandara
- 2) Fatimabee Wd/o Inam Mohammad (Dead)**
Aged about : 72 years, Occ: Nil
- 3) Faji Mohammad S/o Inam Mohammad**
Aged about : 47 years, Occ: Business,
Both 1 & 2 R/o Shukrawari Ward, Pauni,
Tq. Pauni, Dist. - Bhandara
- 4) Faimidabegam W/o Abdul Khalif**
Aged about : 52 years, Occ: Household,
R/o – Sangadi, Tq. Sakoli, Dist- Bhandara
- 5) Shadmabegam W/o Abdul Kalim**
Aged about : 38 years, Occ: Household,
R/o – Riddhapur, Tq. Morshi, Dist-Amravati

...RESPONDENTS

Shri A.P.J.P. Dubey, Advocate for appellant.
Shri P.S. Tiwari, Advocate for respondent No.1

CORAM : **SMT. M.S. JAWALKAR, J.**
DATE : **12/04/2023**

JUDGMENT

Heard. By consent of parties, the matter is taken up for final hearing at the stage of admission.

2. The present second appeal is filed being aggrieved by the judgment and decree dated 28/03/2022 in Regular Civil Appeal No. 108/2016 passed by the learned Principal District Judge, Bhandara, arising out of the judgment and decree dated 13/08/2014 in Regular Civil Suit No. 09/2012 (Old Special Civil Suit No. 64/2009) passed by learned Civil Judge, Junior Division at Pauni.

3. The facts giving rise to file this appeal are as under:-

The area ad-measuring 148.8 sq. meters bearing sheet No.34, city survey No.3440/4 and city survey No. 3439 ad-measuring 57 sq. meters in sheet No.34 is owned and possessed by defendant Nos. 1 to 4. Defendants made construction on 113.52 sq. meters area on ground floor and 64.60 sq. meters on first floor. One room ad-measuring 9 X 35 sq. ft. was given to defendant No.1 on 16/09/2005 by receiving Rs.50,000/- by defendant No.2 towards advance in the presence of panchas.

Defendant No.2 had obtained loan of Rs.2,80,000/- mortgaging the aforesaid property, but failed to repay the loan amount. The Bank initiated action for auction of the suit property, therefore tri praty agreement was executed amongst plaintiff, defendant No.2 and Parmatma Ek Bank on 08/11/2006, on agreement on the part of plaintiff to repay the loan amount of Rs.2,80,000/- and defendant No.2 with the permission of other defendants to sale the suit property to the plaintiff.

4. Accordingly, plaintiff paid outstanding loan amount to the bank and defendant Nos. 1 to 4 entered into agreement to sale of suit property with construction for consideration of Rs.4,25,000/- on 24/07/2007. However, defendant Nos. 1 to 4 had excluded share of defendant No.5. As defendant Nos. 1 to 4 failed to execute sale deed, plaintiff filed suit for specific performance of contract and in the alternative refund of Rs.4,25,000/- with interest @ 18% p.a. with perpetual injunction restraining defendants from disturbing peaceful possession of plaintiff over the suit property. Defendant No.2 filed written statement vide Exh.39 admitting the case of the plaintiff and his readiness to execute sale deed. But, he averred

that defendant No.5 is a co-sharer and not ready to execution of sale deed and therefore the sale deed could not be executed and prayed to dismiss the suit. Defendant Nos. 1, 3 and 4 adopted and admitted the written statement of defendant No.2.

5. Defendant No.5 filed written statement vide Exh.19 claiming that suit property is ancestral property of defendant No.5 and yet not partitioned. The decree of partition has been passed by the Civil Judge, Junior Division, Pauni, against which the appeal has been preferred which is pending. Execution proceeding R.D. No. 4/2009 is also pending before Civil Judge, Junior Division, Pauni, therefore unless the suit property is partitioned, defendant Nos. 1 to 4 cannot claim their right in the suit property. She also claimed right of pre-emption to purchase the suit property and that the agreement is not binding upon her, it being not a registered document hence prayed to dismiss the suit. The learned Trial Court after considering the matter and evidence placed on record decreed the suit and thereby directed defendant Nos. 1 to 4 to execute the sale deed of suit property with construction over it, in favour of plaintiff. Being aggrieved and dissatisfied with the judgment of the trial Court

the defendant No.5 preferred as appeal before the District Judge, Bhandara. The learned Appellate Court dismissed the appeal. The aforesaid judgment and decree is the subject matter of challenge in the present appeal.

6. It is the contention of the learned Counsel for the appellant that both the Courts below erred in allowing the suit and appeal in favour of the original plaintiff by making a go-bye to the mandatory provisions of section 17(1)(b) of Registration Act, 1908, wherein unregistered tri party agreement (Exh.91) dated 24/07/2007 was considered enough to hold that the plaintiff is entitled for the reliefs prayed by him in his suit. It is further contended that the learned lower Courts erred in holding and declaring that the defendants are belonging to Muslim community and the original plaintiff is belonging to Hindu community therefore provisions of Mohammedan Law would be applicable to the case instead of the provisions of Transfer of Property Act and Specific Relief Act, when the plaintiff has filed the suit for specific performance of contract. Both the Courts erred in passing the impugned judgment in the suit when already execution proceeding was decided.

7. Learned Counsel for the respondents supported the judgment and decree passed by the Courts below and stated that both the Courts below have rightly appreciated the facts, circumstances and evidence placed on record and passed an appropriate order.

8. Learned Counsel for the respondents relied on ***Syscon Consultants P. Ltd. Vs. M/s Primella Sanitary Prod. P.Ltd. And others, reported in, AIR 2016 SC 4564.***

9. Heard the learned Counsel for both the parties. Perused the judgments of both the Courts below. The case of the plaintiff was that the area admeasuring 148.8 sq.mtrs. bearing sheet No.34, City Survey No.3440/4 and City Survey No.3439 admeasuring 57 sq.mtrs. in sheet No.34 is owned and possessed by defendant Nos.1 to 4. Defendants made construction on 113.52 sq.mtrs area on the ground floor and 64.60 sq.mtrs. on first floor. One room was given to defendant No.1 by receiving Rs.50,000/- by defendant No.2 towards advance. It appears that defendant No.2 had obtained loan of Rs.2,80,000/- mortgaging the aforesaid property, but failed to repay the loan amount. The

bank initiated action for auction and there was tri-party agreement executed amongst plaintiff, defendant No.2 and Bank on 08/11/2006, on agreement on the part of plaintiff to repay the loan amount of Rs.2,80,000/- and defendant No.2 with the permission of other defendants to sell the suit property to the plaintiff. Accordingly, plaintiff paid outstanding amount of Rs.2,80,000/-. The defendant Nos.1 to 4 entered into an agreement to sell the suit property with construction for consideration of Rs.4,25,000/- on 24/07/2007. However, defendant Nos.1 to 4 had excluded defendant No.5. As defendants failed to execute sale deed, plaintiff filed suit for specific performance of contract and in the alternative refund of amount along with interest.

10. The defendant No.2 filed his written statement and admitted the case of plaintiff and his readiness and willingness to execute sale deed. The defendant Nos.1, 3 and 4 adopted and admitted the written statement of defendant No.2. Defendant No.5 claimed that the suit property is ancestral property of defendant No.5 and yet not partitioned. Defendant No.5 filed suit for partition and separate possession vide Regular Civil Suit

No.10/2005. In the said suit, it was declared that defendant No.5 is having $1/5^{\text{th}}$ share in the suit property. However, there is Appeal Regular Civil Appeal No.05/2009 carried out which was pending at the time of passing of judgment before the learned Appellate Court. The said appeal was decided on 29/11/2014. The learned Appellate Court modified the decree and it was held that being daughter, plaintiff in the said suit (defendant No.5 herein) entitled for $1/5^{\text{th}}$ share of $7/8^{\text{th}}$ share i.e. $7/40^{\text{th}}$ share in the property. The Second Appeal filed by plaintiff therein came to be dismissed. In view of this position, the appellant herein is entitled for share as held in Regular Civil Appeal No.05/2009 which was confirmed in Second Appeal No.236/2015.

11. The defendant Nos.1 to 4 admitted the claim of the plaintiff and as plaintiff had proved that he had paid total consideration of Rs.4,25,000/- out of which he had clear loan amount of Rs.2,80,000/- and paid Rs.50,000/- and then Rs.95,000/- to the defendant Nos.1 to 4. He issued notice to defendant Nos.1 to 4 to execute the sale deed. As such, his readiness and willingness is also proved by the plaintiff. In view of this fact, the judgment and order passed by the learned

Appellate Court needs to be confirmed.

12. The learned Counsel for respondents relied on *Syscon Consultants P Ltd (supra)*, wherein the Hon'ble Apex Court held that in similar set of facts, the purchaser always ready and willing to perform its obligation, discharged mortgage with Bank by paying three times the amount of agreed consideration with clear understanding that defendants would thereafter execute sale deed. It was held in facts and circumstances, grant of decree to the extent of share of defendant No.1 to 6 in favour of plaintiff held not liable to be interfered with. The said matter before the Appellate Court, defendant Nos.7 and 8 not only went back on their undertaking in Court to pay the dues to the Bank so as to avert the auction sale, they have not pursued their claim if any, to the title to the property as per the liberty granted to them by the High Court. The High Court apparently was clear in its mind, that if at all Defendant Nos.7 and 8 wanted to save the situation by exercising their right to pre-emption under the Portuguese Laws, they could still do that within six months. Yet, nothing was done.

13. As one block of 'L' shape house, admeasuring 335 sq.ft. is the subject matter of tri-party agreement and the complete property is not under sale, the defendants can sale out their shares as admittedly suit property is ancestral property. Apart from that property is available for the share of defendant No.5, as such the tri-party agreement needs to be given effect to the extent of share of defendant Nos.1 to 4. Even in civil suit filed by defendant No.5 shares of plaintiff and defendant are decided and finally concluded.

14. So far as, registration is concerned, it was agreement to sale and not the sale deed, the plaintiff was already in possession of suit property. As such, there is no question of registration of tri-party agreement. As such, there is concurrent finding recorded by both the Courts below and no substantial question of law involved in the matter. Accordingly, the present second appeal stands dismissed.

[SMT. M.S. JAWALKAR, J.]

R.S. Sahare

Signed By: RANJANA SAMEER
SAHARE

Signing Date: 15.05.2023 16:59