



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

**SECOND APPEAL NO.556 OF 1992
WITH
CIVIL APPLICATION NO.4661 OF 1992**

Vithal Dhondiba Kasale
(Died) Through L.R.
Bhagwan Vithal Kasale,
Age : 44 years, ccu.: Agriculture,
R/o.: Anantwadi, Tq. Sevgaon,
District : Ahmednagar

.... **APPELLANT**
(Original Defendant)

VERSUS

Bhagwan s/o Rangnath Bodakhe,
Age : 44 years, Occu.: Agriculture,
R/.: Shingori, Tal.: Shevgaon,
District : Ahmednagar

.... **RESPONDENT**

**WITH
SECOND APPEAL NO.678 OF 1992**

Vithal Dhondiba Kasale
(Died) Through L.R.
Bhagwan Vithal Kasale,
Age : 44 years, ccu.: Agriculture,
R/o.: Anantwadi, Tq. Sevgaon,
District : Ahmednagar

.... **APPELLANT**
(Original Defendant)

VERSUS

Bhagwan s/o Rangnath Bodakhe,
Age : 43 years, Occu.: Agriculture,
R/.: Shingori, Tal.: Shevgaon,
District : Ahmednagar

.... **RESPONDENT**

....
Advocate for the Appellant : Mr. Suresh Kulkarni
Advocate for the Respondent : Mr. D. R. Markad h/f
Mr. N. K. Kakade
....

CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 07/02/2024.
PRONOUNCED ON : 29/04/2024.

JUDGMENT :

1. Both these appeals have filed by the appellant- Vithal Dhondiba Kasale, who is original defendant in RCS No.73 of 1978 and plaintiff in RCS No.74 of 1981, against common judgment and order dated 16/07/1992 in RCA No.66 of 1984 and 67 of 1984.

2. Background facts are as under :

The present respondent - Bhagwan Rangnath Bodakhe, who has died during pendency of these appeals, had filed RCS No.73 of 1978 for specific performance of contract in respect of suit land Survey No.35/1B/1+2, admeasuring 76 R, situated at village Antarwali-Khurd, Tq. Shevgaon, District Ahmednagar owned by the appellant – Vithal Kasale. According to the said plaintiff- Bhagwan, the appellant / defendant on 22/03/1972 executed a registered

agreement to sell in respect of suit land in his favour since Vithal was in a need of money. Accordingly, Vithal decided to sell the suit land for a consideration of Rs.1,000/- to Bhagwan and accepted an amount of Rs.800/- at the time of aforesaid agreement to sell. According to Bhagwan, he received possession on the same day of said agreement to sell i.e. on 22/03/1972 but since for the sale deed, necessary permission was required, the sale deed was to be executed within one month from such date of permission. Since Vithal failed to obtain such permission, the plaintiff- Bhagwan asked defendant – Vithal to execute a writing dated 21/04/1975 whereby Bhagwan's possession over the suit land was admitted. Even after the said writing, Vithal did not obtain permission and therefore, Bhagwan issued a notice dated 11/04/1978 to Vithal for performing his part of contract by executing a sale deed of the suit land. The defendant – Vithal did not respond the notice and therefore, Bhagwan filed RCS No.73 of 1978 for specific performance of contract.

Defendant- Vithal resisted the suit by filing written statement and denied all the adverse allegations made against him. According to him, plaintiff – Bhagwan was a money lender and he had taken Rs.500/- from the plaintiff and in respect of that the plaintiff prepared a false and fraudulent document of

agreement to sell of the suit land. It is significant to note that even Vithal had also filed a suit bearing RCS No.74 of 1981 for cancellation of that agreement to sell and delivery of possession of the suit land with allegations that Bhagwan obtained the fraudulent agreement to sell from him as a nominal document and for collateral security of the amount of Rs.500/- which he had taken from Bhagwan. According to Vithal, Bhagwan was doing money lending business and he also obtained forcible possession of the suit land from him. The suit of Vithal was resisted by Bhagwan under written statement Exhibit-14 and reiterated the story of his suit for specific performance. The learned Joint Civil Judge (Junior Division), Shevgaon tried both the aforesaid civil suits by recording common evidence and vide common judgment and order dated 06/12/1983 dismissed the suit bearing RCS No.73 of 1978 filed by Bhagwan for specific performance whereas decreed the suit of Vithal bearing RCS No.74 fo 1981.

Bhagwan then filed two appeals i.e. RCA Nos.66 & 67 of 1984 before the learned District Judge, Ahmednagar i.e. the learned first appellate court and the learned first appellate court vide judgment and order dated 16/07/1992 allowed RCA N.67 of 1984 and dismissed RCS No.74 of 1991 for recovery oof possession filed by Vithal. The learned first appellate court also allowed RCA No.66 of

1984 and decreed RCS No.73 of 1978 by asking Vithal to execute sale deed of the suit land in favour of the plaintiff – Bhagwan in terms of agreement to sell dated 22/03/1972. It is also directed that on execution of such sale deed, Bhagwan be put into possession of the suit land which Vithal had obtained in the execution of decree in his suit wrongfully during pendency of the aforesaid appeals. Hence, these appeals.

3. The learned counsel for the appellant – Vitthal in both these appeals submitted that the learned first appellate court has wrongly allowed the specific performance of contract in favour of Bhagwan by ignoring the material evidence on record. According to him, the learned trial court had in fact held that Bhagwan was not entitled for the decree of specific performance since he could not explain how he came into possession of the suit land when the possession was to be handed over at the time of sale deed. Despite the same, the learned first appellate court allowed the specific performance in favour of Bhagwan. Moreover, the learned counsel for the appellant – Vithal also pointed out that the learned trial court had in fact decreed the suit filed by Vithal for possession of the suit land but the learned first appellate court wrongfully set it

aside. In support of his submissions, he relied on following judgments :

- i) Dr. Miss Kunda d/ Khemraj Chudhary vs. Mathurabai w/o Mahadu Jadhav (deceased) and others, reported in 2016(3) Mh.L.J. 601;**
- ii) Parshram Tanaji Aher and others vs. Dattu Kadu Aher and another, reported in 2014(2) Mh.L.J. 250;**
- iii) Niwas Builders vs. Chanchalaben Gandhi, reported in 2003(3) Mh.L.J. 312;**
- iv) Padmakumari and others vs. Dasayyan and others, reported in 2016(2) Mh.L.J. 307;**
- v) Ishwar Dass Jain (dead) through Lrs. vs. Sohan Lal (dead) by L.Rs. Reported in AIR 2000 SC 426;**
- vi) Order of this court in Second Appeal N.144 of 2022 (Shri Rajendra Mohanlal Agrawal vs. Shri Abhay Tejraj Rathod and another), passed on 14/03/2022;**

4. On the contrary, the learned counsel for the respondent – Bhagwan supported the judgment passed by the learned first appellate court. According to him, both the courts below have given concurrent finding on the execution of agreement to sell and discarded the money lending theory put up by the appellant –

Vithal. Thus, he claims that in view of the concurrent finding there is no substantial question of law involved in this matter and the judgments relied upon by the appellant – Vithal, are in fact supportive to the case of respondent – Bhagwan. He also relied on following judgment.

**i) *K. Prakash vs. B. R. Sampath Kumar,*
 *reported in 2015(3) Mh.L.J. 618.***

5. Heard rival submissions. Also perused documents on record.

6. It is significant to note that Second Appeal No.556 of 1992 is admitted on the ground Nos.2, 3 & 4 of the appeal memo being the substantial questions of law, whereas Second Appeal No.678 is admitted on the ground Nos.2 & 4 of the appeal memo involving substantial questions of law in this matter. Since both these appeals are arising out of the same subject matter, it can be decided by a common judgment. On going through the grounds being raised as substantial questions of law in both these appeals, following substantial questions of law appear to be involved.

i) *Whether the first appellate court erred in granting specific performance in favour of respondent – Bhagwan specially when the learned trial court*

had refused to exercise discretion for granting the same ?

- ii) Whether the learned first appellate court erred in discarding the observation of the learned trial court that the agreement to sell in dispute was for collateral security and not for actual sale?*
- iii) Whether the learned first appellate court erred in holding that the agreement to sell was not for collateral security specially after noticing that there was no delivery of possession in the same at the time of its execution ?*

7. Admittedly, the learned trial court has negated the prayer of specific performance claimed by Bhagwan and granted delivery of possession to the present appellant in suit for cancellation of the agreement to sell. However, for that purpose the evidence is to be scrutinized afresh as there are divergent views by both the courts below. It is significant to note that to support his case, Bhagwan Bodakhe had examined himself at Exhibit-23. Besides him, he also examined Bansi Bodakhe being an attesting witness on agreement to sell Exhibit-24 and subsequent agreement at Exhibit-28. He also examined one Ismile Khan Pathan being an attesting witness of agreement to sell Exhibit-24. On the contrary, the appellant – Vithal examined himself and also examined Raosaheb at Exhibit-36, Suryabhan Shankar Kasale at Exhibit-37 and Vishwanath

Dhondiba at Exhibit-38 on the aspect of alleged money lending business. The evidence shows that respondent – Bhagwan has deposed as per his story and about the execution of agreement to sell Exhibit-24. It is significant to note that the said agreement to sell was executed before Sub-Registrar and the amount was also paid before Sub-Registrar. The attesting witness Bansi Kndiba Bodakhe appears to have deposed as per the case of Bhagwan and the another attesting witness Ismile Khan Pathan also supported the evidence of Bhagwan on the aspect of execution of agreement to sell. On the contrary, the appellant – Vithal has come out with the case that he was paid Rs.300/- only when the agreement to sell got executed from him, which is contrary to his pleading in RCS No.74 of 1981, wherein he claimed that he had received Rs.500/-. Further, though Vithal had claimed that Bhagwan got executed the agreement to sell by playing fraud by him, however Vithal had not raised any objection before the Sub-Registrar before whom the said agreement to sell was executed and registered. As such, the evidence of Bhagwan and his witnesses is sufficient to establish the fact that Vithal had executed the said agreement to sell for actual sale of the suit land. Though the witnesses examined by Vithal are saying that Bhagwan was doing money lending business and the said agreement to sell was executed as collateral security for the

money lending transaction between Bhagwan and Vithal, but they have specifically admitted in their cross-examination that they did not possess any personal information about the alleged money lending business of Bhagwan. On the contrary, witness Suryabhan Kasale stated that his land was sold to Bhagwan and therefore, he filed a suit against Bhagwan for cancellation of that transaction which was in fact of money lending. However, the said suit was pending at that time and nothing is placed on record as to what happened in respect of said suit. Further, Vishwanath Kasale i.e. the witness of Vithal has also admitted that he is a real brother of Vithal and therefore, possibility of deposing in support of Vithal cannot be ruled out. Moreover, the next witness - Raosaheb of Vithal also appears to be close relative of Vithal and therefore his evidence is definitely clouded. Further, though he claimed that Bhagwan was doing money lending but admitted that he had no money lending transaction with Bhagwan. He only said that there was money transaction between Bhagwan and one Laxman Choure in his presence but he could not tell the details of the same and he was also not present when the document to that effect between Bhagwan and Laxman had taken place. Thus, the evidence led by Vithal about the nature of document at Exhibit-24 being executed out of money lending business, is not at all convincing. On the

contrary, the evidence of Bhagwan and his witnesses about the execution of agreement to sell in respect of the suit land appears more probable and reliable.

8. The learned counsel for the appellant – Vithal vehemently argued that when possession of the suit land was to be given to the plaintiff – Bhagwan at the time of sale deed, then what was the necessity of execution of subsequent document Exhibit-28 in the year, 1975 in the nature of '*Kabje Pavati*' of the suit land. He pointed out that the version of the plaintiff – Bhagwan and his witness Bansi Bodakhe are different. Bhagwan was saying that he was put in possession of the suit land on the date of agreement to sell but his witness deposed that it was given subsequently at the time of execution of '*Kabje Pavti*'. Admittedly, the original agreement to sell Exhibit-24 reflects that possession of the suit land was to be given at the time of execution of sale deed but in the said agreement to sell itself it was mentioned that sale deed will be executed after getting necessary permission and thereafter plaintiff's possession shall be confirmed. It is significant to note that the subsequent document Exhibit-28 dated 21/04/1975 is executed in favour of Bhagwan by wife of Vithal i.e. Bhamabai, wherein execution of agreement to sell dated 22/03/1972 executed

by Vithal is specifically mentioned. Moreover, it is significant to note that in the year 1981 Vithal had in fact filed a suit for recovery of possession of the suit land by making allegation against Bhagwan that he forcibly obtained possession of the suit land. However, it is most important to note that Vithal did not file any complaint about losing possession over the suit land to police. This conduct of Vithal definitely shows that he might have delivered the possession of the suit land to Bhagwan at the time of execution of original agreement to sell dated 22/03/1972. It is significant to note that the learned first appellate court by observing this had come to conclusion that Vithal must have given the suit land in possession of the plaintiff – Bhagwan on the day of agreement to sell Exhibit-24 itself. Therefore, the observation of the learned trial court that Bhagwan failed to explain as to how he got possession of suit land appears completely erroneous. Further, there is concurrent finding by both the courts below about execution of agreement to sell Exhibit-24 and its true nature i.e. being executed with intention to sell the land and not for collateral purpose as money lending transaction.

9. The learned counsel for the appellant – Vithal relied on various judgments as mentioned above. However, on going through

the same, it appears that some and substance of the said judgments is that specific performance of contract is a discretionary relief, which cannot be granted arbitrarily or merely because it is lawful to do so, but grant of such relief must be based on evidence on record and on the terms and conditions of the agreement. Here in this case the evidence on record indicates that Bhagwan has established that the appellant – Vithal had in fact executed the agreement to sell Exhibit-24 in his favour for actual sale of the suit land. Moreover, Vithal has not adduced any satisfactory evidence that the said agreement to sell was in fact a collateral security for money lending transaction between himself and Bhagwan. Further, Vithal had accepted before the Sub-Registrar about the nature of that agreement to sell being the transaction for sale of the suit property and not otherwise. Therefore, it appears that the observation of the learned first appellate court in granting specific performance of the said agreement to sell in favour of Bhagwan, is based on evidence on record. Further, it has also come on record that despite stay by the learned first appellate court, Vithal had obtained possession of the suit land by making wrong statement before the executing court and therefore, the direction given by the learned first appellate court to deliver the possession of the suit land alongwith

execution of sale deed, appears proper in the light of facts of this case. Therefore, the judgments relied upon by the appellant- Vithal are not helpful to him. On the contrary, it appears that the learned first appellate court has exercised discretionary jurisdiction of granting specific performance of contract by properly appreciating the evidence on record. As such, no substantial questions of law as raised by the appellant, appear to be involved in this matter. Accordingly, both the second appeals stand dismissed and disposed of.

10. In view of dismissal of second appeals, pending civil application, if any, also stands disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)

11. After pronouncement of the judgment, the learned counsel for the appellant requested to continue the interim relief granted by this court at the time of filing of Second Appeal No.556 of 1992. The learned counsel for the respondent strongly opposed the submission on the ground that though the interim relief was granted but it was not subsequently continued. Moreover, the interim stay was granted only in Second Appeal No.556 of 1992.

However, on perusal of the stay order dated 09/11/1992 it appears that the stay was continued without mentioning any specific period. In view of the same, the interim relief granted vide order dated 09/11/1992 to continue till further period of five weeks.

(SANDIPKUMAR C. MORE, J.)

VS Maind/-