



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 41 OF 2024
WITH CIVIL APPLICATION NO. 2017 OF 2024

Sou. Pushpatai Sampatlal Ostwal (died)
Through LRs

- 1-A. Sampatlal s/o. Mitthulal Ostwal,
Age : 73 years, Occ. : Agriculture,
R/o. : Sarda Nagari, D.P. Road, Beed,
Tq. and Dist. Beed
- 1-B. Vaishali w/o. Sandip Duggad,
Age : 50 years, Occ. : Household,
R/o. : Aniket Society, Bibwewadi, Pune
- 1-C. Anand s/o. Sampatlal Ostwal,
Age : 43 years, Occ. : Agriculture & Business,
R/o. : Sarda Nagari, D.P. Road, Beed,
Tq. and Dist. Beed
- 1-D. Rupesh s/o. Sampatlal Ostwal,
Age : 46 years, Occ. : Agriculture & Business,
R/o. : Sarda Nagari, D.P. Road, Beed,
Tq. and Dist. Beed

... APPELLANTS
(Orig. Defendants)

VERSUS

Dr. Sudhir Ramchandrarao Hirve,
Age : 49 years, Occ. : Medical Practitioner,
R/o. Shahu Nagar, Beed,
Tq. and Dist. Beed

... RESPONDENT
(Orig. Plaintiff)

...

Mr. Anand P. Bhandari – Advocate for Appellants
Mr. S.S. Thombre i/b. Mr. Rahul K. Kasat – Advocate for sole
Respondent

....

CORAM : SANDIPKUMAR C. MORE, J.**DATE : 23rd April, 2024****ORDER :**

1. Heard rival submissions on admission.
2. The present Second Appeal is filed by the appellants who are the legal representatives of original defendant – Sou. Pushpatai Sampatlal Ostawal challenging concurrent finding of both the learned Courts below in respect of claim of present respondent/original plaintiff for specific performance of the suit plot i.e. plot No. 1-6-700 (Old No.1-6-418) admeasuring 441.44 Sq. meters out of C.T.S. No.1715 from Survey No.94 situated at Taraf – Giram, Beed.
3. The respondent/plaintiff has filed Special Civil Suit No.62 of 2008 against the original defendant for specific performance of the aforesaid plot which got decreed in his favour. Thereafter the appeal was filed by the present appellants against the judgment and decree dated 03.08.2017 of learned Civil Judge Senior Division, Beed i.e. the learned Trial Court being Regular Civil Appeal No.106 of 2017. However the said appeal also got dismissed by confirming the decree passed by the learned Trial Court.

4. Learned Counsel for the appellants vehemently argued that, both the learned Courts below erroneously granted the claim of specific performance of the present plaintiff by ignoring the fact that, the respondent/plaintiff suppressed the material fact of measurement of the suit land at the hands of original defendant and issued false notice asking the defendant to execute the sale-deed. According to the learned Counsel for the appellants, the plaintiff himself failed to exercise his claim of specific performance with the time specified in the agreement itself and even after termination of the said agreement of sale by the original defendant, the plaintiff did not care to set aside the termination of contract by making specific prayer in the suit. He pointed out that, even after receiving the reply from the defendant on 03.05.2008 wherein termination of contract was mentioned, the plaintiff filed the suit after five months. As such, the plaintiff was not ready and willing to perform his part of contract. According to him, the following substantial question of law is involved in this appeal :

(a) After termination of contract by the vendor/defendant whether the suit for specific performance is maintainable unless there is a prayer for setting aside such termination is specifically claimed ?

Learned Counsel for the appellants in support of his submissions relied upon the following the citations :

(a) Hon'ble Supreme Court in the case of **I.S. Sikandar (dead) by LRs Vs. K. Subramani and Others**

reported in *(2013) 15 Supreme Court Cases 27*

(b) Hon'ble Supreme Court in the case of **Gaddipati Divija and Another Vs. Pathuri Samrajyam and Others**

reported in *2023 SCC OnLine SC 442*

(c) Hon'ble Supreme Court in the case of **Sita Ram and Others Vs. Radhey Shyam** reported in *(2007) 14*

Supreme Court Cases 415

(d) Hon'ble Supreme Court in the case of **Laurdu Mari David and Others Vs. Louis Chinnaya**

Arogiaswamy and Others reported in *(1996) 5 Supreme Court Cases 589*

5. On the contrary, learned Counsel for respondent/plaintiff submits that, there are concurrent findings of both the Courts below in favour of the respondent/plaintiff and both of them have

properly appreciated the evidence on record by holding that it was for the original defendant to fulfill the condition mentioned in the agreement of sale at Exhibit – 95 for measurement of the suit plot prior to the fixed date for performance i.e. on 20.02.2008. He also relied on the observations of Hon'ble Apex Court in the case of **Gaddipati Divija and Another Vs. Pathuri Samrajyam and Others** reported in *2023 SCC OnLine SC 442* which is also relied upon by the appellants.

6. Admittedly, there is concurrent findings in favour of respondent/plaintiff by both the learned Courts below. The record shows that, the claim of respondent/plaintiff was based on the agreement of sale in respect of suit plot dated 18.12.2007. On perusal of the said agreement it is evident that, the respondent/plaintiff was supposed to get the sale-deed executed till 20.02.2008 by paying the remaining balance consideration. However, it was provided that before 20.02.2008 the original defendant was under obligation to measure the land to ascertain the exact price of the said plot. Though vide notice dated 03.05.2008 the original defendant had terminated the agreement of sale in respect of suit plot by contending that, she had already

got measured the suit plot and the respondent/plaintiff did not pay her balance amount of consideration, but she has conveniently avoided to mention the date of such measurement. Admittedly, the evidence on record shows that, the said measurement was carried out on 11.03.2008 that means much after the date of actual performance i.e. 20.02.2008. Thus it appears that, it was the defendant who had committed breach of condition mentioned in the agreement of sale and, therefore, the respondent/plaintiff was unable to pay the exact price of suit plot till 20.02.2008.

7. Further, learned Counsel for the appellants argued that, the respondent/plaintiff was not ready and willing to perform his part of contract and for that purpose he relied upon judgment of Hon'ble Apex Court in the case of Gaddipati Divija (*supra*). However, the learned Counsel for respondent/plaintiff pointed out certain part of said judgment and claimed that, it was the defendant who committed breach of contract and, therefore, the respondent/plaintiff was unable to pay exact balance amount of consideration in respect of the suit plot. In the aforesaid case it is observed by the Hon'ble Apex Court in paragraph No.36 as under :

36. *Therefore, it can be deduced that unless the vendor got the subject land measured and demarcated within three*

months, it would be impossible for the purchaser (Respondent No.1 herein/Plaintiff) to get a sale deed executed, and as such, the question of paying the balance sale consideration does not arise...

Here in this case also the original defendant was supposed to measure the suit land prior to 20.02.008 but she failed to do so and thereafter belatedly got measured the suit plot on 11.03.2008. As such, the aforesaid observation of Hon'ble Apex Court applies in the instant case.

8. Secondly, the substantial question of law raised by the learned Counsel for the appellants, being involved in this appeal, is concerned, the learned Counsel for the appellants heavily relied on the observation of Hon'ble Apex Court in the case of I.S. Sikandar (*supra*) wherein the Hon'ble Apex Court has made following observations :

35. *The plaintiff had issued reply letter dated 16.03.1985 to the advocates of defendant Nos. 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another legal notice dated 28.03.1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed*

executed on or before 10.04.1985, and on failure to comply with the same, the Agreement of Sale dated 25.12.1983 would be terminated since the plaintiff did not avail of the time extended to him by defendant Nos. 1-4.

36. *Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985.*

37. *As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law.*

38. *Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point (i) is answered in favour of*

defendant No.5.

9. Admittedly, the Hon'ble Apex Court as per the aforesaid observations has held that in a suit for specific performance a prayer for declaratory relief to declare the termination of agreement of sale as bad in law, is necessary for granting of decree for specific performance in favour of plaintiff but the aforesaid observation has mainly come on record in the light of peculiar facts and circumstances of that case as reflected in paragraph No.35. In that case the plaintiff had admitted his fault in performing his part of contract and has sought time for extension to get the sale-deed in his favour after such performance of his part. Further, it is evident that, the defendant in the said case vide subsequent notice dated 28.03.1985 had granted plaintiff such extension of time for payment of sale consideration and execution of sale-deed till 10.04.1985. It is significant to note that, on failure to comply with the same within the extended date, the agreement of sale was to be terminated. In that case the plaintiff was at fault, despite extension of time and, therefore, the termination of that agreement was required specific prayer of setting aside. In the instant case the facts are different. Here the original defendant herself had committed breach of condition of the agreement of sale by not

measuring the land prior to 20.02.2008 as agreed. She belatedly did so, after the date of performance on 11.03.2008. Therefore, the substantial question of law as raised by the learned Counsel for the appellants does not appear to be involved in the instant case. Thus, considering the concurrent findings of both the learned Courts below in the light of evidence on record, there is no substance in the appeal and accordingly the appeal stands dismissed.

10. The Second Appeal is accordingly disposed of alongwith pending Civil Application No.2017 of 2024.

[SANDIPKUMAR C. MORE]
JUDGE