



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

SECOND APPEAL NO. 382 OF 2023

Shivaji S/o Vithalrao Vilegave
Age 55 yrs., Occu. Service,
R/o. Subhash Nagar,
Kawale – Patil Apartment,
Barshi Road, Latur

... APPELLANT
[Original Defendant]

VERSUS

Madhav Gurunath Birajdar
Age 59 yrs., Occu. Service,
R/o. Sawewadi, Latur,
Tq. & Dist. Latur

... RESPONDENT
[Original Plaintiff]

....
Mr. Nileshsingh J. Patil, Advocate for appellant
Mr. Sharad V. Natu, Advocate for respondent
....

CORAM : Y. G. KHOBRAGADE, J.

DATE : 27 MARCH 2024

ORDER :-

1. Heard Mr. N. J. Patil, learned Counsel appearing for the appellant and Mr. S. V. Natu, learned Counsel appearing for the respondent.

2. By the present appeal under Section 100 of the Code of Civil Procedure, the appellant/ori. Defendant challenged the judgment and decree dated 31.01.2023 passed by the learned

District Judge-2, Latur, in Regular Civil Appeal No. 16 of 2018 thereby affirmed the judgment and decree dated 19.07.2014 passed by the learned 3rd Joint Civil Judge Senior Division, Latur in Special Civil Suit No. 93 of 2012.

3. Present appellant is the original defendant and the respondent is the original plaintiff in Special Civil Suit No. 93 of 2012. For the sake of brevity, I would like to refer the parties to the present appeal in their original capacity as Plaintiff and defendant.

4. Brief facts giving rise to the plaintiff's case are that, on 27.11.2009, the defendant entered into an agreement with the plaintiff to sale the property bearing Plot Nos. 7 & 8 admeasuring 30 X 50 ft., situated in Survey No. 233 within the limit of Latur Municipal Corporation. Consideration amount of Rs.8,00,000/- was fixed. At the time of execution of said agreement, the plaintiff paid Rs.3,51,000/- as earnest money, which has been accepted by the Defendant. Accordingly, an Agreement to sale was reduced in writing. The defendant had agreed to execute sale-deed on or before 30.06.2010 on accepting remaining consideration amount at the time of execution of the sale-deed. According to the plaintiff, though he was ready and willing to execute the sale-deed, but the defendant

avoided to execute sale-deed in his favour. Therefore, the plaintiff issued the legal notice, calling upon the defendant to execute sale-deed in his favour by accepting balance consideration amount. The said notice was duly served upon the defendant, but it was not replied. Therefore, the plaintiff has filed a suit and thereby prayed for decree of specific performance of contract or in alternate prayed for refund of earnest money including incidental relief.

5. Though, the defendant served with the notice, but he failed to appear and did not file written statement. Therefore, vide order dated 25.11.2013, the suit was proceeded ex parte against the defendant.

6. In order to prove the claim, the plaintiff adduced evidence. After conclusion of trial, on 19.07.2014, the learned Trial Court passed the judgment and decree and held that, the defendant had agreed to sale suit plots to the plaintiff for the consideration amount of Rs.8,00,000/-, out of which the defendant received earnest money to the tune of Rs.3,51,000/- and though, the plaintiff/Vendee is ready and willing to perform his part of contract, but the defendant/vendor failed to perform his part of contract. Therefore, decree of specific performance has been passed and defendant was

directed to execute sale-deed in respect of the suit property in favour of the plaintiff within a period of two months therefrom.

7. Being aggrieved by the said judgment and decree, the defendant/respondent preferred first appeal bearing R.C.A. No.16 of 2018, before the learned District Judge-2, Latur. After hearing both the sides as well as on re-appreciation of evidence, the learned first appellate Court, passed the impugned judgment and decree dated 31.01.2023 and affirmed the judgment and decree of the trial Court.

8. The learned Counsel appearing for the appellant/defendant, vehemently canvassed that the agreement to sale Exh.24 is not registered one and also no sufficient stamp duty has been paid. Therefore, Un-registered Agreement to sale Exh.24 is not admissible in evidence. Both the Courts below ought not to rely on said Agreement and testimony of the plaintiff could have been discarded and the suit ought to have dismissed.

9. It is further canvassed that, both the Courts below failed to consider that the respondent/plaintiff has not made any efforts for execution of the sale-deed within stipulated period as agreed. Therefore, the plaintiff's suit ought have been dismissed, however,

both the Courts below failed to consider this aspect of the matter. Therefore, the impugned judgment and decree passed by the trial Court and which was affirmed by the first appellate Court needs to be quashed and set aside.

10. The learned Counsel for the appellant canvassed the plaintiff issued a notice after lapse of two and half (2 ½) years, however, both the Courts below failed to consider this fact and passed the decree, which is not sustainable in the eyes of law.

11. To buttress this submissions, the learned Counsel appearing for the appellant places reliance on the case of *P Daivasigamani Vs. S. Sambandan – [2022] 18 S.C.R. 199.*

12. Per contra, the learned Counsel appearing for the respondent/plaintiff supported the judgment and decree passed by both the Courts below and submits that as per the agreement to sale dated 27.11.2009 (Exh.24), the defendant has agreed to sale his plots bearing Nos. 7 and 8 admeasuring 30 X 50 ft. The defendant had agreed for consideration amount of Rs.8,00,000/- and the plaintiff agreed to pay the said amount. The plaintiff paid Rs.3,51,000/- as earnest money to the defendant at the time of execution of the

agreement. As per the terms and conditions of the agreement, the defendant has to execute registered sale-deed in favour of the plaintiff on or before 30.06.2010 on accepting balance consideration amount. The agreement to sale Exh. 24 duly notarized before the Public Notary in presence of two attesting witness.

13. Though the defendant duly served with the notice, but he failed to appear before the trial Court and not contravened the pleadings of the plaintiff. Ultimately, suit proceeded exparte. Not only this, but the plaintiff himself examined at Exh.41 and examined the attesting witness Vajinath Chawale PW-2 at Exh.24. The plaintiff proved agreement to sale Exh.24, office copy of legal notice dated 28.09.2010 Exh.39, postal receipt and acknowledgment Exh.20 and 21 respectively.

14. The Agreement To sale Exh.24 bears the signature of the plaintiff and defendant as well as of two attesting witnesses, which is registered before the Public Notary. The payment of receipt is appended with the agreement Exh.24. Therefore, it proves that there was a concluded contract between the plaintiff and defendant within the meaning of Section 10 of the Indian Contract Act. As per the terms and conditions of Agreement sale Exh.24, the plaintiff paid

Rs.3,51,000/- to the defendant and executed agreement Exh.24 in favour of the plaintiff for sale of suit property in consideration of Rs.8,00,000/-. Further, as per the recital of agreement Exh.24, the defendant had agreed to execute sale-deed in favour of the plaintiff on or before 30.06.2010. However, the defendant failed to execute the sale-deed. Ultimately, the plaintiff issued legal notice Exh.39, which was duly served upon the defendant under postal acknowledgment Exh.21. The Defendant has not denied service of legal notice Exh. 39 and no any defence was set out for non execution of sale deed in favour of the plaintiff.

15. Since, the Defendant did not file Written Statement and not contravened pleading set out in the suit, therefore for the first time in Second Appeal it is not permissible for the defendant to challenge the agreement being not enforceable on ground that it is Unregistered document.

16. Sec. 17 of the Registration Acts provides compulsory registration of documents if the immovable property more than one hundred rupees or upwards is involved, under the non-testamentary instruments which purport or operate, create, declare,assign,limit or extinguish, whether in present or in future any right, title or interest,

whether vested or contingent requires to be registered. Section 17 of the Registration Acts enlists the documents for which registration is compulsory, such as sale deeds and rent agreements. However, it does not provides about compulsorily registration of the Agreement to sale. Needless to say that, even if the agreement reduced in writing in presence of attesting witnesses is sufficient to prove the concluded contract between the parties within the meaning of Section 10 of the Indian Contract Act.

17. Section 10, Section 16 and Section 20 of the Specific Relief Act provides as under:-

“Section 10. - Cases in which specific performance of contract enforceable – Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced -

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation - Unless and until the contrary is proved, the court shall presume -

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) xxx xxx xxx xxx

Section 16 – Personal bars to relief – Specific performance of a contract cannot be enforced in favour of a person -

(a) xxx xxx xxx xxx xxx

(b) xxx xxx xxx xxx xxx

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation. —For the purposes of clause (c), —

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

Section 20 - Discretion as to decreeing specific performance.—

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such 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 and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract

voidable, makes it inequitable to enforce specific performance.

Explanation 1. Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2. The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party”.

18. In case of *P. Daivasigamani* (supra), the Hon’ble Supreme Court considered the expression readiness and willingness used in Section 16(c) of the Specific Relief Act and held that the Court can exercise discretionary jurisdiction for granting decree of specific performance. But, the said discretionary jurisdiction cannot be exercised arbitrarily.

19. In the case in hand, both the Courts below recorded concurrent findings that, on 27.02.2009, the defendant entered into

an agreement to sale in respect of suit plots on consideration of Rs.8,00,000/-, out of which earnest money of Rs.3,51,000/- accepted by the defendant and had agreed to execute sale-deed on or before 30.06.2010 as per written agreement to sale Exh.24. The plaintiff proved said transaction, but the defendant failed to execute sale-deed. Therefore, findings recorded by the learned 3rd Joint Civil Judge Sr. Dn., Latur and which was affirmed by the learned District Judge - 2 are based upon the oral, documentary evidence as well as provisions of law and no perversity is found in the same. Therefore, I do not find any substantial question of law is involved in the present appeal. **Accordingly, the present Second Appeal is hereby dismissed.**

20. Parties to bear their own cost.

21. In view of dismissal of the second appeal, pending civil application No.8831 of 2023 is disposed of.

[Y. G. KHOBRADE, J.]

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