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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 528 OF 1999
WITH
INTERIM APPLICATION ST NO. 32662 OF 2024
IN
SECOND APPEAL NO. 528 OF 1999**

Shri. Vasant Maruti Doke
Age: 50 yrs old, Occu: Agri.
R/o Mahim, Tal: Sangola,
Dist. Solapur.

.....Appellant

Vs.

1. Shri. Madhukar Agatrao Katkar
Age: 35 yrs old, R/o Deshmkh-wadi
under Atpadi, Tal: Atpadi, Dist. Sangli

2. Shri. Tanaji Shivaji Doke
G.A.L. Suman Shivaji Doke

3. Shri. Laxman Vasant Doke.

4. Shri. Tukaram Krishna Ghadage

Respondent nos. 2 to 4 are residing
at Mahim Tal. Sangola, Dist. Solapur

.....Respondents

Mr. M. A. Patil advocate for the appellant
Mr. Anant Vadgaonkar for respondent no. 1

CORAM : GAURI GODSE, J.

DATE : 12th DECEMBER 2024.

ORAL JUDGMENT:

INTERIM APPLICATION ST NO. 32662 OF 2024:

1. This application is for restoration of the second appeal which was dismissed for non prosecution on 22nd January 2024.
2. Learned counsel for the applicant submits that he was unable to attend the hearing when called out due to his personal difficulty. He therefore requests for recalling the order and restoring the second appeal for hearing on merits.
3. Learned counsel for the respondent no. 1 (original plaintiff) submits that if the second appeal is to be restored, learned advocate for the appellant be called upon to argue the second appeal on merits immediately.
4. In the facts and circumstances of the case, the application is allowed in terms of prayer clause (a) and (b) and the second appeal is restored.

SECOND APPEAL NO. 528 OF 1999:

5. Heard learned counsels for the parties. The second appeal is admitted by order dated 30th November 1999 on the questions of law

formulated in ground nos. 3, 8 and 15 of the appeal memo which read as under:

“3. Whether the courts below were right in decreeing the plaintiff’s suit for specific performance of the contract against the appellant when in fact the appellant was not exclusive owner of the suit property at the time of alleged agreement to sale?

8. Whether the alleged agreement to sale made by one co-parcener of being Gat No. 909.80 Are, in pursuance of the said agreement the court below were right to decree in the suit filed by plaintiff for specific performance of contract, and binding on other co-parceners who are not the party in the said alleged agreement u/s 235(6) of the Hindu Law?

15. Whether the facts and circumstances of the case, pending the partition suit in between the appellant and his brother and two sisters, how the below courts has no right to ascertain the appellant’s share in the suit property?”

6. The suit filed by respondent no. 1 for specific performance of agreement dated 29th August 1982 is decreed by directing the appellant to execute the sale deed as per the agreement for sale by directing the plaintiff to deposit the balance consideration amount of ₹3000/-. The first appeal preferred by defendant no. 1 to challenge the trial Court's judgment and decree is dismissed and the trial Court's decree is confirmed. It is the plaintiff's case that defendant no. 1 had agreed to sell the suit land, i.e. the share of defendant no. 1 in Gat No. 909 for a total consideration of ₹7000/-. It is the plaintiff's case that ₹4000/- was paid and the balance consideration of ₹3000/- was to be paid at the time of execution of the sale deed. The plaintiff contended that he called upon defendant no. 1 to execute a sale deed, however, defendant no. 1 refused to perform his part of contract and thus the suit for specific performance was filed.

7. Defendant no. 1 filed his written statement and denied the suit claim on the ground that on the date of the execution of the agreement for sale, he was not the owner of the suit land. He contended that the suit land was owned by his father and the revenue records indicated the name of defendant no. 1's father. He further contended that defendant no. 1's brother and two sisters were co-parceners in respect

of the suit land and thus the agreement for sale could not be specifically performed. Defendant no. 1 also contended that he never intended to sell the suit land and that the plaintiff had taken his signature on a blank stamp paper. Defendant nos. 2 to 4 were added as party defendants as the rights were created in their favour in respect of the suit land. The suit proceeded ex-parte against defendant no. 2. Defendant nos. 3 and 4 resisted the suit claim on various grounds and contended that they were bonafide purchasers without notice. The trial Court decreed the suit against defendant no. 1. The trial Court's decree was challenged only by defendant no. 1 by filing an appeal. The first Appellate Court has confirmed the findings recorded by the trial Court on the issues of execution of a valid agreement for sale, readiness and willingness in favour of the plaintiff to perform the contract and on the ground that the plaintiff was entitled to execution of the sale deed in terms of the agreement.

8. Learned counsel for the appellant submitted that on the date of agreement of the suit agreement, the appellant was not the owner of the suit land, hence, the suit for specific performance was not maintainable. He further submitted that the plaintiff never issued any notice calling upon defendant no. 1 to perform his part of contract. He

submits that the notice relied upon by the plaintiff was a notice issued by his mother. He therefore, submitted that the plaintiff was never ready and willing to perform his part of contract.

9. Learned counsel for the appellant submitted that the earnest money claimed to have been paid to defendant no. 1 was never paid by plaintiff but the amount received by defendant no. 1 was an amount paid by Namdeo to defendant no. 1. He therefore, submits that the earnest amount claimed to have been paid by the plaintiff cannot be accepted as a part performance of the suit agreement. He, therefore, submits that the plaintiff is not entitled to a decree for specific performance.

10. Learned counsel for the appellant relied upon the decision of the Hon'ble Apex Court in the case of *Aniglase Yohannan Vs. Ramlatha and Ors*¹, *Vijay Kumar and Ors Vs. Om Prakash*² and *Baxis Singh Vs. Sukhdev Singh (Dead) Thru. LRs and Ors*³. He submits that in view of the legal principles settled by the Hon'ble Apex Court in the said decisions, the plaintiff was not entitled to discretionary relief of specific performance as the parameters under section 20 of The Specific Relief

¹ AIR 2005 SUPREME COURT 3503

² AIR 2018 SUPREME COURT 5098

³ AIR 2018 SUPREME COURT 2157

Act, 1963 ('the said Act') were not satisfied. He submits that the readiness and willingness on the part of the plaintiff was not proved and thus, the parameters as settled by the Hon'ble Apex Court in the aforesaid decisions as required under clause (c) of section 16 of the said Act were are not satisfied. He therefore, submitted that all the questions of law be answered in favour of the appellant and the impugned judgments and decrees be set aside by allowing the second appeal.

11. Learned counsel for respondent no. 1 (original plaintiff) supports the impugned decree. He submits that the suit agreement was executed only to the extent of defendant no. 1's undivided share. He submits that the decree for specific performance is in terms of the suit agreement which is only to the extent of defendant no. 1's undivided share. He further submits that defendant no. 1 does not dispute that he has no share in the suit land. He submits that there is no question of any exclusive ownership of defendant no. 1 in respect of the suit land when the suit agreement and the impugned decree is only to the extent of defendant no. 1's undivided share.

12. Learned counsel for respondent no. 1 further submits that in

plaint paragraph 3, the plaintiff had specifically pleaded that defendant no. 1 was called upon orally as well as by way of a written notice to accept the balance consideration amount and execute the sale deed. He submits that the said pleadings are not denied by defendant no. 1. He further submits that by adducing oral evidence, defendant no. 1 proved issuance of the notice dated 30th August 1994, produced at exhibit 1. He further submits that the only part to be performed by the plaintiff was payment of balance consideration amount at the time of execution of the sale deed. Hence, there is no question of plaintiff not being ready and willing to perform his part of contract. He further submits that the question of law framed by this Court does not pertain to the readiness and willingness of the parties. He further submits that in view of the concurrent findings of facts recorded by both the Courts, the grounds argued on behalf of the appellant regarding readiness and willingness would not require any consideration by this Court as the same will not raise any question of law.

13. Learned counsel for respondent no. 1 submits that the second appeal is admitted on the questions with regard to defendant no. 1's exclusive ownership and whether the co-parceners were necessary parties to the suit. Learned counsel for respondent no. 1 submits that

both the Courts have accepted that defendant no. 1 had undivided share in the suit property. He submits that based on defendant no. 1's undivided share in the suit property, the suit is decreed as per the terms and conditions of the agreement which is with regard to defendant no. 1's undivided share. He therefore, submits that the arguments raised on behalf of the appellant in ground nos. 3, 8 and 15 do not raise any substantial question of law required to be answered by this Court. He submits that in view of the concurrent findings of facts and the admission of defendant no. 1 that he has undivided share in the suit land, the impugned judgments and decrees be confirmed.

14. I have considered the submissions made on behalf of the parties. Perused the papers of the second appeal as well as the record and proceedings. The suit agreement at exhibit 40 is with regard to undivided share of defendant no. 1 to the extent of 80 Are in Gat No. 909. A perusal of the terms and conditions of the suit agreement at exhibit 40 clearly records that the suit agreement is for defendant no. 1's undivided share to the extent of 80 Are in the suit land. It is not the defendant no. 1's case that he has no undivided share in the suit land. Hence, I do not find any substance in the arguments raised on behalf

of the appellant that defendant no. 1 was not the owner of the suit land on the date of execution of the agreement; hence, the suit for specific performance was not maintainable. The plaintiff produced notice at Exhibit 41, in support of his pleadings that defendant no. 1 was called upon to execute the sale deed by accepting the balance consideration. Defendant no. 1's contention that the amount paid to him was paid for his work by Namdeo is disbelieved. It is held that Namdeo with whom defendant no. 1 claimed to have been working was not examined. Thus, payment of earnest money and readiness and willingness to pay balance consideration is accepted in favour of the plaintiff, by both the Courts.

15. A perusal of the reasons recorded by both the Courts indicate that defendant no. 1's undivided share in the suit property is concurrently accepted by both the Courts. Even otherwise, it is not defendant no. 1's case that he has no undivided share in the suit land. Thus, in view of the admitted facts of the case and the concurrent findings recorded by both the Courts, the question regarding the exclusive ownership of the plaintiff would not arise for consideration by this Court. Since the suit is decreed for specific performance in terms of the suit agreement which is restricted to undivided share of

defendant no. 1 in the suit land, the other co-parceners of the suit land are not necessary parties to the suit. In view of the terms and conditions of the suit agreement and the impugned decree, the plaintiff would step into the shoes of defendant no. 1 with regard to his undivided share. Hence, the other sharers in the suit land are not necessary parties to the suit. In such circumstances, the pendency of partition suit amongst other co-sharers in the suit land would not have any effect on the suit for specific performance. Hence, the questions of law formulated in ground nos. 3, 8 and 15 are answered in favour of respondent no. 1.

16. The terms and conditions regarding the total consideration, payment of earnest money and payment of balance consideration at the time of execution of the sale deed supports the pleadings of the plaintiff. Learned counsel for respondent no. 1 is right in submitting that the plaintiff had pleaded issuance of written as well as oral notice to defendant no. 1 calling upon him to execute the sale deed. A perusal of the written statement nowhere indicates any denial on the part of defendant no. 1.

17. In view of the concurrent findings recorded on the point of

readiness and willingness, the grounds argued on behalf of the appellant on readiness and willingness would not require any consideration by this Court. I do not find any illegality or perversity in the reasons recorded by both the Courts on the point of readiness and willingness of the plaintiff. Hence, this Court is not required to further elaborate on the arguments raised regarding readiness and willingness of the plaintiff. The issue regarding readiness and willingness of the plaintiff does not raise any question of law required to be answered by this Court.

18. The Hon'ble Apex Court in the case of *Vijay Kumar* held that the plaintiff has to show and establish readiness and willingness and prove the payments made. The Hon'ble Apex Court in the decision of *Aniglase Yohannan* held that if the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint, he should not be denied the relief. In the present case, in view of the concurrent findings of facts in favour of the plaintiff, the legal principles settled by the Hon'ble Apex Court supports the plaintiff's case. In view of the facts of the case and the questions of law answered by this Court, in favour of the plaintiff, the legal principles settled by the Hon'ble Apex Court in the decisions relied by the learned counsel for

the appellant are of no assistance to the appellant.

19. For the reasons stated above, the second appeal is dismissed and the impugned judgments and decrees are confirmed.

[GAURI GODSE, J.]

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MASHAL

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IRESH MASHAL
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