IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 259 OF 2017
WITH
CIVIL APPLICATION NO.560 OF 2017

1. Vitthal Kalyanrao Choundgundi
Age- 48 years, Occ : Business

2. Anupama Vitthal Choundgundi
Age -41 years, Occ : Household
Both R/ at Gat No. 187, Urulikanchan
Tal. Haveli, Dist. Pune. ...Appellants/ Applicants

Versus

Subhangi Rajendra Gurav
Age -43 years, Occ : business
R/at Fat No. 601, Rohini Apartment,
Dsk Vishwa Dhayari, Pune. ...Respondent.

WITH
INTERIM APPLICATION NO. 2859 OF 2020
IN
SECOND APPEAL NO. 259 OF 2017

Subhangi Rajendra Gurav
Age -46 years, Occ : Business
R/at Fat No. 601, Rohini Apartment,
Dsk viswa Dhyari, Pune-411041,
Presently residing at Saptasur D/603
DSK Vishwa, Dhayari, District Pune 411041 ...Applicant.

Versus

1. Vitthal Kalyanrao Choundgundi
Age- 51 years, Occ : Business

2. Anupama Vitthal Choundgundi
Age -44 years, Occ : Household
Both R/ at Gat No. 187, Urulikanchan
Tal. Haveli, Dist. Pune. ...Respondents.

Adv. Rohan P. Surve for the Appellant.
Adv. Sushant Prabhune (through V.C.) a/w Mamta Pandey for the Respondent.

Coram	**:**	**Sharmila U. Deshmukh, J.**
Reserved on	**:**	**April 18, 2024.**
Pronounced on	**:**	**May 3, 2024.**

JUDGMENT :

1. Second Appeal is at the instance of the original Defendant Nos. 1 and 2 suffering concurrent findings decreeing the Special Civil Suit No. 519 of 2010 filed by the Respondent-Plaintiff herein. For the sake of convenience, the parties are referred to their status before the Trial Court.

FACTUAL MATRIX :

Plaint :

2. Special Civil Suit No. 519 of 2010 was instituted seeking specific performance of agreement of sale dated 7th November, 2008 executed between the Plaintiff and the Defendants and registered in the office of Sub Registrar Haveli at Sr. No. 9255. The suit property is described as 2R land along with RCC construction admeasuring 975 sq. ft. Grampanchayat property No. 7 ward No. 6 Urulikanchan situated on part of Gat No. 187, District Pune, owned by Defendant No. 1. An agreement for sale was executed on 7th November, 2008 wherein the agreed consideration was shown as Rs.10,00,000/- and out of the total consideration of Rs.10,00,000/-, the Plaintiff paid Rs.25,000/- by way of cash and Rs.2,00,000/- was paid vide cheques dated 11th November, 2008 and 13th November, 2008 to the Defendants.

3. As per the terms of agreement for sale, the balance amount of Rs.7,75,000/- was to be paid after the Plaintiff obtains bank loan within period of two months. As per Clause 4(h) of the agreement for sale dated 7th November, 2008, the loan of Rs.1,50,000/- obtained by the Defendants from Hanuman Gramin Bigar Sheti Patsanstha Maryadit was to be repaid by the Defendants and clearance certificate to be handed over to the Plaintiff before the execution of sale deed.

4. The Plaintiff applied for loan to various banks and showed her willingness to execute the sale deed. However, the Defendant failed to clear the encumbrance of Hanuman Gramin Bigar Sheti Sahakari Pathsanstha Ltd (Hanuman Gramin) and to obtain clearance certificate without which the Plaintiff’s loan could not be sanctioned. The

Defendants avoided to comply with their obligations of executing the sale deed and delivery of possession and thus legal notice was issued on 5th June, 2009 to which there was no response from the Defendants. As such, suit came to be filed seeking specific performance of the agreement for sale.

WRITTEN STATEMENT OF THE DEFENDANTS :

5. The case of the Defendants was that due to financial difficulties by reason of the various loans as well as the financial burden of educational expenses of the children and the marriage of the daughter being fixed, the Defendants decided to sell their house. The Defendants informed the Plaintiff that there was a loan of Rs.1,00,000/- of one Mahatma Gramin Bigarsheti Sahakari Patsanstha Maryadit, loan of Rs.75,000/- of Gram Rajya Nagari Sahakari Patsanstha Maryadit and loan of Rs.1,50,000/- of Hanuman Gramin Viaks Bigarsheti Sahakari Patsanstha Maryadit. The Defendants were informed that the transaction would be cash transaction and amount of loan would be paid in lumpsum. The consideration agreed between the parties was of Rs.10,25,000/- out of which Rs.25,000/- was given on 29th August, 2008 and Visar Pavti/agreement of sale was notarized. The balance amount was to be paid within a period of 6 months from the date of execution of sale deed. On 7th November, 2008 the agreement for sale was registered with Sub Registrar Haveli. The document was handed over to the Defendants without being permitted to read the contents.

6. It was contended that as per the Visar Pavti dated 29th August, 2008, the consideration was Rs.10,25,000/- whereas in the agreement for sale dated 7th November 2008, the consideration is shown as Rs.10,00,000/- and the time for payment of balance consideration was within period of 6 months from 29th August, 2008 to 9th March, 2009. The Defendants were informed that for the purpose of assisting the Plaintiff for obtaining loan the document was required to be registered and the agreement dated 7th November, 2008 came to be registered. On 27th December, 2008 the Plaintiff came to the house of the Defendants along with her husband and one unknown person and obtained the signature of the Defendants on a stamp paper of Rs.50/- by assuring that payment of Rs.50,000/- would be made and without making payment after obtaining the signature left the house. On 15th February 2009, written complaint was made, however, as no cognizance was taken by the police, on 21st January, 2011 criminal case has been filed before the JMFC. Notice dated 5th June, 2009 was received by the Defendants however, Defendants have not replied to the notice.

EVIDENCE :

7. The Plaintiff examined herself and the attesting witness to the agreement for sale dated 7th November, 2008. The Defendants examined themselves and also the official from Mahatma Gramin Bigarsheti Sahakari Pathsanstha Ltd. and the guarantor in respect of loan of Hanuman Gramin.

FINDINGS OF THE TRIAL COURT :

8. The findings of Trial Court can be broadly summarised as under :

- The evidence of the Plaintiff is supported by the evidence of attesting witness and documentary evidence i.e Visar Pavti dated 29th August, 2008 and agreement for sale dated 7th November, 2008.

- The Defendants evidence is inconsistent with the pleadings and is not trustworthy.

- If the signatures of Defendants had been obtained on blank stamp paper, the Defendants would have replied to the legal notice.

- The Defendants failed to prove the total consideration was fixed at Rs.10,25,000/- and that the Plaintiff has not prepared false and bogus documents.

- The evidence of the Plaintiff is in consonance with

Clause-H of the agreement for sale dated 7th November, 2008. The evidence of the Defendants that the sale deed was to be executed within a period of six months from the date of agreement is contrary to Clause-4(A) of the agreement for sale deed of 7th November, 2008.

- The Plaintiff was ready and willing to perform the part of the contract and the Defendants were in breach of agreement as the loan of Rs.1,50,000/- of Hanuman Gramin was not repaid.

APPELLATE COURT FINDINGS :

9. The Appellate Court framed and answered the points for determination as under :

Sr. No.	Points	Findings
01.	Does Plaintiff proves that she is entitled for specific performance of contract?	...In the Affirmative.
02.	Does Plaintiff proves that she was and is 'ready' and 'willing' to perform her part of contract ?	...In the Affirmative.
03.	Is there any need to interfere in the impugned Judgment & Decree, dtd. 31/10/2012., passed by Ld. Trial Court?	...In the Negative.
04.	What order ?	As per final order.

10. The Appellate Court considered that the Defendant No. 1 has admitted that the agreement for sale was written in Marathi as the Defendants can read and write Marathi and that he has also admitted the undertaking committed through the said agreement for sale. The Appellate Court noted that the cheques of sum of Rs.2,00,000/- were encashed by the Defendants. The Appellate Court noted that the attesting witness Yogesh B. Bibwe has deposed as to the terms and conditions of the agreement for sale and the consideration being fixed at Rs.10,00,000/- as well as the payment of earnest money. The Defendant No. 1 has admitted that consideration of Rs.10,00,000/- is higher than the market value and that the said transaction cannot be said to create hardship for the Defendant. The Plaintiff is ready and willing to pay the balance amount however, the Defendants failed to clear the debt and failed to obtained clearance certificate from the financial institution and thus, the Plaintiff was unable to obtained the loan from the bank.

SUBSTANTIAL QUESTION OF LAW :

11. The Second Appeal came to be admitted by order dated 7th September, 2017 on the following substantial question of law.

"Whether the Trial Court as well as the First Appellate

Court were justified in holding that the Appellants are required to specifically perform the Agreements dated 29th August, 2008 and 7th November, 2008 pertaining to the suit property in favour of the Respondent ?"

SUBMISSIONS :

12. Mr. Surve, learned counsel for Appellant submits that the Visar Pavti dated 29th August, 2008 discloses that the agreed consideration was Rs.10,25,000/- and transaction had to be completed within a period of 6 months. He submits that the agreement for sale dated 7th November, 2008 added pre-condition of clearance of loan of Rs.1,50,000/- taken from the financial institution and the consideration was reduced from Rs.10,25,000/- to Rs.10,00,000/-. He submits that the Defendant had taken three loans of Rs.1,00,000/-, Rs.1,50,000/- and Rs.75,000/- and that is the reason why the property had to be sold and is evidence of the fact that the pre-condition of clearing only one loan of Rs.1,50,000/- has been inserted without the consent of the Defendants. He submits that on 15th February, 2009 written complaint was filed with the police. He submits that as there is no valid and legal enforceable contract due to variance in the terms of the Visar Pavti and agreement for sale, specific performance could not have been granted.

13. *Per Contra*, Mr. Prabhune, learned counsel for the Respondent would submit that the Trial Court and the Appellate Court have arrived at concurrent finding as regards the execution of the agreement for sale and the readiness and willingness of the Plaintiff. He further submits that the balance consideration has already been deposited by the Respondent in the execution proceedings. Pointing out to the various clauses of the agreement for sale dated 7th November, 2008, he submits that the obligation was upon Defendants to clear the loan and thereafter the period of two months would commence. He would point out to the evidence of the Defendant No. 1 and would submit that the Defendant No. 1 has admitted that in respect of other loans he has not mortgaged any property and the loan agreement has not been tendered in evidence. He submits that there was no reply to the legal notice issued by the Plaintiff and there is no challenge to the agreement of sale. As regards the alleged signatures being obtained on blank stamp papers in December, 2008 he submits that there was already an agreement for sale executed between the parties and it is not shown as to where the said blank stamp papers were utilized.

14. He would submit that the terms of the said Visar Pavti are unreliable due to different figures at different places. He submits that the complaint was filed on 15th February, 2009 and there is a delay in filing of the complaint. He submits that the agreement for sale being valid document specific performance was rightly granted.

REASONS AND ANALYSIS :

15. The jurisdiction to order specific performance of contract is based on the existence of valid and enforceable contract. Even in case where there is a valid and enforceable contract, discretion is vested in the Court by taking into consideration the totality of circumstances to order specific performance of the contract or not as by way of specific performance, what the Court does is to enforce the obligations contained in the contract and hence, the terms and conditions of the agreement have to be certain.

16. The contention of Defendants is that there is no valid and enforceable contract as terms of Visar Pavti varies from the terms of the registered agreement for sale. To put it simply the case of the Defendants is there was no informed consent of the Defendants to the registered agreement for sale as the terms were changed without the knowledge of the Defendants. The execution of the Visar Pavti dated 29th August, 2008 as well as the agreement for sale dated 7th November, 2008 is however, not in dispute. The difference in the terms of the Visar Pavti and Agreement for Sale is *qua* the sale consideration which is reduced from Rs.10,25,000/- to Rs.10,00,000/- and addition of pre-condition of clearance of loan of Hanuman Gramin of Rs.1,50,000/-.

17. The Visar Pavti was notarised on 29th August, 2008 and the Agreement for Sale was registered on 7th November, 2008. and there is a presumption that the registered document has been validly executed. In order to determine whether the Defendants were aware of the terms of the registered agreement for sale and had agreed to the terms, the evidence when perused discloses that Defendant No. 1 has given vital admissions in his cross-examination.

18. The submission of Mr. Surve *qua* the added pre condition is that there were other two loans and therefore there is no reason why only clearance of loan of Rs.1,50,000/- would be agreed between the parties. In the cross-examination the Defendant No. 1 has admitted that in respect of the Mahatma Gramin Bigarsheti Sahakari Patsanstha and Gram Rajya Nagari Sahakari Patsanstha, the loan was obtained without any collateral security. He has further admitted that the loan agreement has not been produced in the present proceedings and even in the written statement there is no mention of any such loan agreement. He further admits that the encumbrance of Hanuman

Gramin has been noted in village from 8A and no other encumbrance is noted on village 8A. It is thus evident that as the Plaintiff required the clearance certificate of the suit property for obtaining loan, as the only encumbrance on the suit property was the loan of Hanuman Gramin, the pre condition of clearance of loan of Hanuman Gramin was agreed by the parties.

19. The Defendant No. 1 has further admitted that as per the agreed terms on 7th November, 2008, the agreement for sale was executed. He has admitted that the agreement for sale contains the signature of himself and his wife. He has admitted that it was agreed that the remaining amount of Rs.7,75,000/- will be paid within a period of two months from the agreement date. He has admitted that the per-condition of removal of encumbrance on the said property is part of the agreement for sale and that the consent of the Defendants has been recorded in the agreement for sale. Most pertinently, he has admitted that the market value of the suit property is about Rs.8,53,000/-, however, the sale consideration was agreed for Rs.10,00,000/-.

20. The Defendant No. 1 has further admitted that he is conversant with Marathi language and the agreement has been scribed in Marathi so that the contents can be understood by the Defendants. He has further admitted that the consideration of Rs.10,00,000/- is more than market rate and he has no document to show that the sale consideration was fixed at Rs.10,25,000/-. He has further admitted that he had received a sum of Rs.2,25,000/- and in the expectation of receiving the balance amount, he has registered the agreement for sale. He has further admitted that he was aware that the balance amount was to be received within a period of two months and that the village form 8A as well as the 7/12 extract was handed over by him to the Plaintiff at the time of registration of the agreement for sale. He has further admitted that he has agreed in the agreement for sale that the encumbrance of Hanuman Gramin Bigarsheti Sahakari Patsanstha Maryadit will be cleared prior to execution of sale deed. He has admitted that the encumbrance of Hanuman Gramin was to be cleared by him within period of two months. He has admitted that due to loan encumbrance, the Plaintiff's loan could not be sanctioned.

21. He has further admitted that at the time of execution of the agreement for sale he had taken legal advise and when he approached his Advocate, he was aware of the terms of the agreement for sale. He was admitted that after understanding the terms of the agreement of sale he has signed the agreement for sale.

22. The Defendants have examined an official of Mahatma Gramin

Bigarsheti Sahakari Patsanstha Maryadit who has deposed that a loan of Rs.1,00,000/- was obtained by the Defendant No. 2 which has been repaid on 1st December, 2008 along with the interest aggregating to Rs.1,89,204/-. In the cross-examination, the witness has admitted that the evidence as regards the repayment of the loan amount of 1st December, 2008 was prior to his joining of the service. He has further admitted that he has not obtained any approval from the financial institution for the purpose of giving evidence. He has further admitted that he has not aware whether any action was taken by the financial institution against the Defendant for non payment of the loan. He has further admitted that he has not perused the office file as pertaining to the loan obtained by the Defendants prior to appearing before the Court.

23. The witness of the agreement for sale dated 7th September, 2008 has been examined by the Plaintiff who has deposed that the sale consideration was fixed at Rs.10,00,000/- and accordingly the agreement for sale executed which was registered on 7th September, 2008. He has deposed that the Defendants had signed the agreement in his presence and thereafter he has signed as witness. He has further deposed that the payment of Rs.2,25,000/- was paid by the Plaintiff to the Defendant toward part sale consideration.

24. The admissions given by the Defendant No. 1 in his cross-examination noted above has practically demolished the defence of the Defendants. The evidence would demonstrate that the agreement for sale dated 7th November, 2008 has been executed by the Defendants after complete understanding of the terms thereof and therefore the consent of the Defendants was free and informed consent and there is no element of fraud proved by the Defendants. In event if the execution of the agreement for sale was contrary to the agreed terms the logical step would be send legal notice to the Plaintiff setting out the said facts and terminating the agreement for sale. On the contrary, in the present case, even after the notice dated 5th June, 2009 was issued to the Defendants calling upon them to execute the sale-deed, there is no response of the Defendants to the said document. Even in the present proceedings where the relief of specific performance of the agreement was sought, there is no counter claim filed by the Defendants seeking cancellation of the agreement for sale. By not complying with their obligations of removal of encumbrance of Hanuman Gramin, despite having received Rs.2,25,000/, the Defendants have committed breach of the agreement for sale.

25. If we consider the case of the Defendants as regards the variance in the terms of Visar Pavti and the agreement for sale, perusal of the Visar Pavti which is at Exhibit 39 shows that the sale consideration is shown as Rs.10,25,000/- and the agreement for sale consideration is shown at Rs.20,000/-. It is admitted position that the amount which was paid before the execution of the Visar Pavti was Rs.25,000/- and not Rs.20,000/-. In clause-4 of the said Visar Pavti, there is an admission that cash amount of Rs.25,000/- is received by the Defendants for which there is no separate receipt issued and in clause-4 immediately thereafter it is stated that the balance amount of Rs. 1,05,000/- will be paid at the time of execution of the sale deed. Considering clauses 3 and 4 together, if the sum of Rs.25,000/- was paid out of total agreed consideration of Rs.10,25,000/-, the balance amount would be Rs.10,00,000/- and not Rs.10,05,000/- as stated. It is therefore clear that there is error in the amounts written in the Visar Pavti and the Defendants are seeking to take undue advantage of the error.

CONCLUSION:

26. From the evidence on record, it is established that the terms and conditions of the registered agreement for sale were in accordance with the terms agreed upon between the Plaintiff and the Defendants. The Defendants had executed the registered agreement for sale being fully aware of the terms and conditions contained therein. Despite having received part payment of Rs.2,25,000/-, the Defendants failed to comply with their obligation to clear the encumbrance of Rs.1,50,000/- of Hanuman Gramin. As the pre condition was not satisfied, the Plaintiff could not obtain loan and the Plaintiff is ready and willing to comply with the terms of the agreement. The agreed consideration of Rs.10,00,000/ was more than the market value and no hardship would be caused to the Defendants.

27. Considering the totality of circumstances, the Appellate Court has rightly ordered specific performance of the registered agreement for sale dated 7th November, 2009.

28. The substantial question of law is accordingly answered against the Appellant. Resultantly, Appeal stands dismissed.

29. In view of dismissal of Second Appeal, Civil/Interim Applications, if any, taken out therein are not survive for consideration and the same are disposed of.

[Sharmila U. Deshmukh, J.]