



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 834 OF 2015

Haridas Hanmant Kadam]
Aged 58 yrs. Adult Occ. Agriculturist,]
Residing at Valse, Taluka Satara,]
District Satara.] .. **Appellant.**

Versus

1. Shankar Shripati Kadam (since deceased)]
through his heirs and legal representatives:]
 - a) Tarubai Shankar Kadam]
Adult. Household work,]
Residing at Shelkewadi,]
Taluka Satara, District Satara.]
 - b) Kamal Baban Sapkal,]
Adult. Household Work,]
Residing at Golewadi, Post-Gajawadi,]
Taluka Satara, District Satara,]
 - c) Ranjana Hinduraro Jadhav,]
Adult. Household work.]
Residing at Ambawde,]
Taluka Satara, District Satara.]
2. Kisan Shankar Kadam,]
Adult. Occ. Painter.]
Residing at Valse, Taluka Satara,]
District Satara.]
3. Sunil Shankar Kadam.]
Adult. Occ. Driver and Agriculturist.]
Residing at Valse, Taluka Satara,]
District Satara.] .. **Respondents.**

WITH
SECOND APPEAL NO. 403 OF 2017

Haridas Hanmant Kadam]
Aged 52 yrs. Adult Occ. Agriculturist,]
Residing at Valse, Taluka Satara,]
District Satara.] .. **Appellant.**

Versus

1. Pandurang Wamanrao Kadam]
Adult. Occ. Agriculturist.]
2. Shankar Shripati Kadam.]
Adult. Occ. Agriculturist (deleted)]
3. Kisan Shankar Kadam]
(since deceased through his heirs and]
representatives:)]
 - a) Smt. Savita Kisan Kadam]
Adult, Occ. Household work]
 - b) Mrs. Pooja Mahesh Jadhav]
Adult, Occ. Household Work,]
 - c) Shreyash Kisan Kadam,]
Minor, through his natural guardian]
mother Smt. Savita Kisan Kadam]
Nos.3(a) and 3 (c) residing at]
Shelkewadi, Taluka Satara,]
No.3(b) residing at Ambavade BK]
Taluka Satara, District Satara.]
4. Sunil Shankar Kadam,]
Adult. Occ. Driver and Agriculturist,]
Nos.1 and 4 residing at Valse,]
Taluka Satara, District Satara.]
Nos.2 and 3 residing at Shelkewadi,]
Taluka Satara, District Satara.] .. **Respondents.**

Mr. S.G. Deshmukh a/w Mr.Pradeep Gole and Mr.Suraj Shejwal, for the Appellants in both the Second Appeals.

Mr. V.A. Shastry, for Respondent Nos.1A to 1C, 2A to 2C and 3 in Second Appeal No.834 of 2015.

Mr. V.A. Sugdare i/by Mr. Ravi Kadam, for the Respondent No.1 in Second Appeal No.403 of 2017.

Coram : Sharmila U. Deshmukh, J.
Reserved On : April 01, 2024.
Pronounced On : May 07, 2024.

JUDGMENT :

1. By way of the present Second Appeal, the original Plaintiff is before this Court challenging the common judgment dated 24th April, 2015 passed in Regular Civil Appeal Nos.394 of 2000 filed by the original defendant No.1 to 3 and Regular Civil Appeal No.292 of 2002 filed by the original Defendant No.4. The 1st Appellate Court has allowed the Appeals resulting in dismissal of the Special Civil Suit No.46 of 1989 seeking specific performance of agreement for sale deed 23rd December, 1988.

2. As both the Second Appeals arise out of common judgment dated 24th April, 2015, with consent of the parties the Appeals were heard together and are being disposed of by this common judgment. For sake of convenience, the parties are referred to by their status before the Trial Court.

FACTUAL MATRIX:

PLAINT:

3. Special Civil Suit No.46 of 1989 was instituted seeking specific

performance of the agreement for sale dated 23rd December, 1988 and for direction to Defendant Nos.1 to 3 to hand over possession in event of finding that Plaintiff is not in possession of the suit property. The suit property was described in the plaint as 15 Anna 3 Ps. share admeasuring 1 H 47 Are out of Gat No.151 total admeasuring 1 H 55 Are of village Valse, Tal. Satara. The case of the plaintiff was that the defendant no.1 executed an agreement for sale dated 23rd December, 1988 with the consent and in presence of the defendant nos.2 and 3 for total consideration of ₹70,000/- and also handed over possession of the property to the plaintiffs. Part consideration of ₹50,000/- was paid to the defendant no.1 in the presence of the Sub Registrar. The alienation of the suit property was by defendant no.1 in his capacity as "*Karta*" of the joint family property and for the purpose of buying a new Tractor and for digging of Well. The permission of the Resettlement Officer was necessary for execution of the sale-deed which obligation was accepted by defendant no.1 and it was decided that after permission is obtained within period of six months, the balance of sum of ₹20,000/- would be paid and the sale-deed would be executed. Public notice was issued in respect of the transaction on 18th January, 1989 to which the Defendant No.1 and Defendant Nos.2 and 3 responded stating that the defendant no.1 has already executed an agreement for sale dated 18th November, 1987 in favour of the defendant no.4 for a total consideration of ₹1,40,000/- and that the possession of the suit land is with the defendant no.1. The plaintiff is ready and willing to pay balance amount of ₹20,000/- as per the agreement for sale dated 23rd December, 1988, however, as the defendant nos.1 to 3 have refused to perform their obligations, the present suit has been filed.

WRITTEN STATEMENT:

4. The common contention of the defendants in their respective written statements is denial of execution of agreement for sale by Defendant No.1 in favour of Plaintiff. The suit land is an ancestral joint Hindu family property of the defendant nos.1 to 3 and the son of the defendant No.2 as well as the sister of the defendant no.1. The defendant No.1 had executed an agreement for sale of the entire suit land in favour of the defendant no.4 on 18th November, 1987 for total consideration of ₹1,40,000/- with consent of defendant nos.2 to 3 and their sister - Ratnabai. ₹20,000/- has been received from defendant no.4 as earnest money.

5. The plaintiff after becoming aware of the transaction between the defendant nos.1 and 4 approached the defendant no.1 misrepresenting that he has been deputed by Defendant No.4 for accompanying Defendant No.1 to Collector's office for filing necessary application for permission as the suit property was tenanted property. Accordingly, the defendant no.1 accompanied the plaintiff to the Collector's office where the Defendant No.1's signature was obtained on document purporting to be an application seeking Collector's permission. Rs.50,000/ was handed over to the Defendant No.1 which was accepted by him before the Sub-Registrar and confirmed under misconception that the amount was being paid on behalf of Defendant No.4. As the document of 23rd December, 1988 was written in haste by the Plaintiff, the document does not incorporate the condition of obtaining Collector's permission being tenanted property. The defendant no.1 is an illiterate person and can only manage to sign. The defendant Nos.2 to 3 have not consented to the agreement for sale with the Plaintiff and were not present at the

time of the signing of the document by the defendant no.1.

6. The defendant no.1 is the owner of about 2 Acres 35 Gunthas land at village Shelkewadi apart from Gat No.151 at village Valse and thus owns landed property admeasuring 6 Acres 30 Gunthas. If the alleged agreement for sale was executed by the Defendant No.1 for 3 Acres 27 Gunthas with the Plaintiff, the remaining land would be 2 Acres 35 Gunthas for which there is no necessity of purchasing a Tractor. There is no necessity of digging Well as the landed property is at Shelkewadi is sufficiently irrigated. It was further contended that the execution of the alleged agreement of sale would result in creating fragment as only 18 Are land would remain with the defendant no.1.

7. For sale of the suit property Collector's permission and Resettlement Officer's permission is required. On 10th February, 1989, when the defendant no.4 asked the defendant no.1 to accompany him for making an application before the Resettlement Officer, the defendant No.1 informed him that on 9th February, 1989 the defendant No.1 had been with the plaintiff and has made the necessary application. Upon inquiry with the Resettlement Office, the Defendants learnt that the application signed on 9th February, 1989 for the purpose of permission for sale of land to the plaintiff has been rejected by the Resettlement Officer due to non obtaining permission under Section 43 of the Tenancy Act. It was contended that on 10th February, 1989, an application was made under Section 43 of the Tenancy Act for permission to sell to the defendant no.4 and one Bhanudas Bajirao Pawar which has been granted.

FINDINGS OF THE TRIAL COURT :

8. The Trial Court by judgment dated 31st October, 1991 decreed the suit directing the defendant no.1 to execute the sale-deed of the suit property after obtaining necessary permission from the S.D.M. within two months. The findings of the Trial Court can be summarized thus:

- The execution of agreement of sale between Plaintiff and Defendant No 1 has been duly proved by examining the witness and scribe of the document.
- The Defendant No.1 has admitted receipt of sum of Rs.50,000/ and his signature of the documents.
- The Defendant Nos.2 and 3 having accepted Rs.25,000/- each in their bank accounts were aware of the transaction and source of the funds.
- The Plaintiff was ready and willing to pay the remaining amount whatsoever to the defendant no.1. even if it is held that the consideration was Rs 1,20,000/ and not Rs.70,000/-.
- The possession receipt at Exhibit 70 mentions about the plaintiff being put in possession.
- The Defendant No.1 has not proved the agreement dated 18th November, 1987 executed between defendant no.1 and Defendant No.4.
- The permission obtained by the defendant no.1 to dispose of the suit property to the defendant no.4 and one Bhanudas Pawar can be modified and a fresh permission can be sought to legalize the suit transaction.

PROCEEDINGS LEADING TO REMAND:

9. The original defendant nos.1 to 3 filed Regular Civil appeal No.394 of 2000 whereas the defendant no.4 filed Regular Civil Appeal No.292 of 2002 challenging the judgment and decree of the Trial Court. The Appellate Court framed an additional issue as to whether the possession of the suit property was delivered to the plaintiff on the date of alleged agreement to sale dated 23rd December, 1988 and referred the issue to the Trial Court. In furtherance thereof the plaintiff examined himself and one Sanjay Kadam and the defendant no.2 examined himself and one Balu Barge. The additional issue of possession was decided by the Trial Court vide judgment and order dated 20th February, 2015.

10. The Trial Court held that the Defendant No.1 has not denied the execution of the agreement for sale and possession receipt. The witness examined by the Plaintiff has deposed about the suit property being in possession of the Plaintiff. The Defendant No.2 who was examined on behalf of the Defendants is not aware of the boundaries of the suit property or the crop cultivated on the suit property. The Defendant No.2 has admitted in cross-examination that he is doing the work of painting and his brother is cultivating the agricultural land at Shelkewadi. The Trial Court held that the Defendant Nos.1 to 3 are not in possession of the suit property. The Trial Court noted that the receipts of assessment tax showed the remark as paid through the Plaintiff. The Trial Court noted that PW-6 has deposed that the suit property was in possession of Plaintiff for about 5-6 months and thereafter due to restraining orders passed by the Court the possession is with the Defendant No.1, however, the Defendants have not produced copy of the restraining order passed by the Court. The

Trial Court held that the Defendants are not in possession of the suit property.

APPELLATE COURT PROCEEDINGS:

11. After the judgment of Trial Court passed on remand, RCA No.394 of 2000 was preferred by Defendant Nos.1 to 3 and RCA No.292 of 2002 was preferred by Defendant No 4 which came to be allowed leading to the present Appeal.

FINDINGS OF THE APPELLATE COURT:

- The property is joint family property and the Defendant Nos.2 and 3 were not present at the time of execution of the agreement for sale as their signatures would have been otherwise obtained on the deed.
- The Competent Authority has refused the permission for sale of the suit land.
- There is discrepancy in the deposition of the Plaintiff's witnesses as regards the location where the agreement for sale and possession receipt were executed and the agreed consideration.
- PW-1 deposed that the agreed consideration was Rs.1,20,000/- and that the scribe had prepared the agreement for sale and possession receipt executed before the Sub-Registrar at Satara.
- PW-2 deposed that the execution of the agreement for sale took place at village Shelkewadi and thereafter the parties went to the Sub-Registrar Office and on the same day the possession receipt of the suit property was prepared. The agreed consideration was Rs.70,000/-.
- PW-3- scribe of the document deposed that the agreement for sale and possession receipt were prepared at the Sub-Registrar's office at Satara and the possession receipt was prepared by his nephew Sanjay Jadhav.

- PW-6-father of the plaintiff admits that the agreement was for consideration of ₹1,20,000/- and deposed that the last meeting about the agreement was at Shelkewadi and on the next date all of them came to Satara and only Manik Kadam scribed the document as per the instructions of the defendant no.1 and thereafter all went to the Sub Registrar Office.
- PW-6 has admitted that the possession of the suit land was delivered to them, but, the possession was retained with them only for 5 to 6 months and thereafter they were restrained by an order of injunction from entering the suit land and presently the possession is with the defendant No.1.
- The possession receipt Exhibit 70 is not reliable document considering the evidence with respect to its execution and the receipt is result of misrepresentation.
- The execution of the alleged agreement for sale is doubtful as only 18 Are land remained with Defendant Nos.1 to 3 and there is no adjoining land of defendant nos.1 to 3.
- The Trial Court has not noted the material contradictions in the Plaintiff's evidence with respect of alleged agreement for sale and possession receipt.
- The plaintiff has neither proved the execution of the agreement for sale nor possession and is not entitled to the relief of specific performance of agreement for sale.

SUBSTANTIAL QUESTIONS OF LAW:

12. The Second Appeal was admitted on 6th October, 2015, on the following substantial questions of law, which reads thus:

"a. Whether the appellant plaintiff is entitled to specific

*performance of agreement for sale dated 23.12.1988
Exhibit 72 ?*

*b. Whether the appellate court failed to consider the
possession receipt executed by the defendant at the time
of signing agreement of sale ?*

SUBMISSIONS:

13. Mr. Deshmukh, learned counsel appearing for the Appellant would submit that the defense of Defendant No.1 was of fraud and misrepresentation which he has failed to prove. He submits that the alleged agreement for sale executed with Defendant No.4 has not been proved. He submits that the defendant no.1 examined himself but was not available for the cross-examination and as such his evidence cannot be considered. He would further submit that the issue of creation of fragment has been rightly answered by the Trial Court by holding that as the permission was given on 5th June, 1989, it can be modified *qua* the present plaintiff. He submits that the Trial Court has specifically held that permission of Sub-Divisional Officer is required to be taken and even if the Resettlement Officer has rejected the permission, the same is irrelevant. He points out to the agreement for sale which is Exhibit 72 and would submit that the same refers to 15 Anna 3 ps. share and that the said document has been signed by the plaintiff as well as the defendant no.1. Pointing out to the possession receipt executed on 25th December, 1998, he submits that it is specifically stated therein that possession of the property is handed over to the defendant no.1. He submits that irrelevant discrepancies were noted by the Appellate Court *qua* the location of execution of agreement for sale. He submits that the

permission of the Resettlement Officer has been rejected on technical ground that permission from the Sub Divisional Officer is required. He submits that after the amendment to Section 43 of the Maharashtra Agricultural and Tenancy Act, the permission is not required. He submits that the property being ancestral property, the defendant no.1 who was father of the defendant nos.2 and 3 was entitled to alienate the property for legal necessity. He submits that there is presumption as regards the registered document and the burden was upon the defendant to prove otherwise and the defendants have failed to discharge the burden. He submits that there is no police complaint filed by the defendant no.1 and neither the sum of ₹50,000/- has been returned by the defendant no.1. In support of his submissions, he relies upon the following decisions:

- (i) ***Satya Narain vs. Smt. Nanki Dev Defendant, [AIR 1968 Allahabad 224];***
- (ii) ***Hajra Bai and Others v. Jadavba [AIR 1986 Madhya Pradesh 106];***
- (iii) ***Prem Singh and Others v. Birbal and Others [2006 (5) Mh.L.J. 441];***
- (iv) ***Bishundeo Narain and Another v. Seogeni Rai and Others [AIR 1951 SC 280];***

14. *Per contra*, Mr. Shastry, learned counsel for Respondent Nos.1A to 1C, 2A to 2C and 3 in Second Appeal No.834 of 2015 submits that the partial cross-examination conducted can be read in evidence in which the permission to sell was produced. He submits that the agreement being illegal and unenforceable cannot be specifically performed. He submits that by reason of agreement for sale fragment is created and as such there is violation of the provisions of The Maharashtra Prevention of Fragmentation and Consolidation of

Holdings Act, 1947. Drawing attention of this Court to the area mentioned in the agreement for sale, he submits that the description of 15 Anna 3 Ps. share does not speak of share of the defendant no.1. He would further submit that without seeking the relief of possession of the suit property, substantial relief of specific performance cannot be granted. He submits that the PW-1 had produced the photocopy of the possession receipt which is inadmissible in evidence. He further submits that two different versions of consideration are given and as such, it cannot be said that the plaintiff was ready and willing to perform his part of the contract. He further submits that the legal necessity is not proved as by reason of the alleged sale of considerable portion of land there is no necessity for purchase of Tractor or digging of Well. Pointing out to the evidence of the plaintiff and there is no evidence on the aspect of legal necessity. He submits that the prior agreement was for sum of ₹1,40,000/- and therefore, it is improbable that after period of two years, agreement would be executed for lesser amount. He relies upon the following decisions:

- (i) ***Shrikant s/o. Trimbakrao Begade and Others vs. Natthu Maroti Shivarkar (dead) through Liquidators Jyoti wd/o. Natthu Shivarkar and Others, [2017 DGLS (Bom.) 896;***
- (ii) ***Prasad:K.P.Ramamurthi vs. V.Govindaswami Mudaliar [1981 DGLS (SC) 478];***
- (iii) ***Prem Singh and Others v. Birbal and Others [2006 (5) Mh.L.J. 441];***
- (iv) ***Bishundeo Narain and Another Appls v. Seogeni Rai and Others resps. [AIR 1951 SC 280];***

15. Mr.Kadam, learned counsel for the defendant No.4 in the connected Second Appeal would adopt the submissions of Mr. Shastri and in addition would point out to the findings of the Appellate Court

on the aspect of the possession. He submits that the Appellate Court has considered the evidence of the PW-6 that possession of the suit land was delivered to them but they were holding possession only for 5 to 6 months and thereafter they were restrained by an injunction from entering the suit land. And the further admission that the possession of the suit land is with Defendant No 1. He relies upon the decisions of Apex Court in the following cases:

- (i) ***U. N. Krishnamurthy (since deceased) through LRs. v. A. M. Krishnamurthy, [AIR 2022 SC 3361];***
- (ii) ***S.P. Chengalvaraiya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. and Ors., [(1994) 1 SCC 1].***

16. In rejoinder, Mr. Deshmukh, learned counsel for the Appellant submits that the land retained after the sale can be used for non-agricultural purpose. He submits that the possession was with the plaintiff and after the injunction was granted, the plaintiff did not enter the suit land. He submits that the position on the date of suit is required to be considered. He submits that the plaintiff has been ready and willing to pay the purchase price of ₹1,20,000/-. As regards the legal necessity he submits that the defendant no.1 has admitted that he has 3 Acres of land and as such, the purchase of Tractor may be for in respect of the other lands. He submits that the evidence of the defendant no.1 would show that the defendant no.1 is residing with his son and the amount is deposited in his son's account and as such the consent of the defendant nos. 2 to 3 is implied.

REASONS AND ANALYSIS:

17. The Plaintiff seeks specific performance of agreement for sale 23rd December, 1988 and possession if held to be out of possession.

The execution of the Agreement for Sale dated 23rd December, 1988 and possession receipt has been admitted by the Defendant No.1. The defense is that the documents are result of fraud practiced by the Plaintiff and were executed by Defendant No 1 under misconception that his signatures are obtained for seeking permission for sale of the suit property to the Defendant No 4 and the sum of Rs.50,000/- was accepted under the belief that the payment is pursuant to the agreement for sale executed with Defendant No.4.

18. To succeed in a suit for specific performance the Plaintiff has to establish that firstly there is a valid agreement for sale executed by the Defendant in his favour and the terms thereof, secondly that the Defendant has committed breach of the agreement for sale, thirdly the continuous readiness and willingness by the Plaintiff, fourthly whether it is equitable to grant relief of specific performance or it will cause hardship and lastly whether Plaintiff is entitled to alternate relief of refund of earnest money.

19. Section 10 of The Indian Contract Act, 1872 provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and, are not hereby declared to be void. Section 19 of The Indian Contract Act, 1872 provides that where the consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is a contract voidable at the option of the party whose consent was so caused. Section 9 of Specific Relief Act, 1963 permits the party against whom relief of specific performance is claimed to plead by way of defense any ground which is available to him under any law relating to contracts.

20. The Defendant No.1 was thus entitled to raise the defense of fraud and misrepresentation, which burden lay upon the Defendant No.1 to establish, having accepted the execution of the Agreement for Sale and possession receipt. Initially, the Defendant No 1 appeared and faced cross examination and thereafter did not make himself available for cross examination. After the matter was remanded by the Appellate Court for leading evidence on additional issue of possession, evidence was led by the Defendants.

21. The Defendants having failed to offer himself for cross examination in the proceedings before remand, part evidence adduced by the Defendant No 1 cannot be considered. The Defendant No 1 has thus failed to discharge the burden cast upon them to prove that the execution of the Agreement for Sale and possession receipt was result of fraud and misconception. The evidence adduced on aspect of possession can be taken into consideration.

22. Despite the failure on part of Defendants to establish their case of fraud and misrepresentation, as the suit is for specific performance which is a equitable remedy, the Court is not bound to order specific performance even if it is lawful to do so. The discretion vested in the Court is required to be exercised judicially considering the totality of the circumstances of the case.

23. Coming to the facts of the present case, the subject matter of transaction is 15 Anna 3 paise share in land bearing Gat No 151. The entire area of Gat No 151 admeasures 1 Hectar 55 Are and the agreement for sale with Plaintiff is for sale of 1 Hectar 47.1/2 Are. The Appellate Court has held that the Defendant No.1 has not executed the agreement for sale of suit land in favour of Plaintiff on 23rd

December, 1988. The burden was upon the Plaintiff to prove that there was valid agreement for sale executed in his favour by the Defendant No.1 of which he seeks specific performance. To put it simply, the Plaintiff has to establish that by the executed document, the Defendant No.1 agreed to sell the suit property to the Plaintiff. In that respect if the evidence of the Plaintiff's witnesses is examined, the scribe as well as the attesting witnesses have been examined by the Plaintiff who have deposed about the execution of the agreement in their presence. The evidence on record proves the execution of the document but what is required to be proved that by executing the agreement for sale, the Defendant No.1 agreed to sell the suit property to the Plaintiff. It is in that context the Appellate Court has noted the discrepancies in the Plaintiff's witnesses evidence as to the location of execution of the agreement for sale and held that the execution has not been proved. Perusal of the Plaintiff's evidence discloses that the witnesses deposition is at variance qua the location where the agreement for sale was executed. This aspect assumes importance to examine whether the transaction of sale had in fact taken place between the Plaintiff and Defendant No.1.

24. The Plaintiff has deposed that the agreement for sale was prepared and executed at Sub Registrar's office by Manik Kadam the bond writer who works at Sub Registrar's office. As per PW-3 the transaction took place at Village Shelkewadi with the intervention of the witness and Pandurang and the Defendant No.1 signed in his presence and after the document was prepared all of them went to Sub Registrar's office. Manik Kadam the bond writer has deposed that he had prepared the document after going through the 7/12 extract and in his presence the parties and witnesses had put their signature.

PW-6 had deposed that the last meeting about the agreement was at the house of Defendant No 1 at Shelkewadi and the next day all came to Satara and at Satara Manik Kadam prepared the agreement for sale as per instructions of Defendant No.1 and after signatures were affixed they went before the Sub Registrar.

25. The discrepancy in the evidence of the Plaintiff creates doubt as the transaction of sale forming subject matter of the agreement. The Appellate Court has rightly noted the discrepancy and held that the evidence brought by the Plaintiff is improbable.

26. Even if it is accepted that there was an agreement for sale executed between the Plaintiff and Defendant No.1, as per the unamended Section 20 of Specific Relief Act, 1963 the Court is not bound to grant such relief merely because it is lawful to do so and the jurisdiction to decree specific performance is vested with the Court which power is discretionary and to be exercised for sound and reasonable reason. In ***M.P. Mathur vs. DTC, (2006) 13 SCC 706***, the Apex Court observed thus:

“The discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well settled principles. Therefore, the court has to consider—the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of the parties and the effect of the court granting the decree. In such cases, the court has to look at the contract. The court has to ascertain whether there exists an element of mutuality in the contract. If there is absence of mutuality the court will not exercise discretion in favour of the plaintiffs.

Even if, want of mutuality is regarded as discretionary and not as an absolute bar to specific performance, the court has to consider the entire conduct of the parties in relation to the subject-matter and in case of any disqualifying circumstances the court will not grant the relief prayed for (Snell's Equity, 31st Edn.)"

27. In my view, considering the totality of the facts and circumstances of the present case, the agreement for sale dated 23rd December, 1988 cannot be specifically enforced for the following reasons:

(A) The alienation,if any, of the suit property by the Defendant No.1 was invalid as neither legal necessity is proved nor consent of Defendant Nos.2 and 3 obtained:

(i) Admittedly land bearing Gat No.151 is ancestral property in which the Defendant Nos.2 and 3 i.e the sons of Defendant No.1 also have a share, which is evident from the recital in the agreement for sale and the pleading in the plaint. Pertinently the agreement describes the area of the suit property and does not contain any recital about the suit property being restricted to the undivided share of Defendant No.1. It is settled that the Karta of joint family is entitled to alienate the joint family property for legal necessity and the burden lies upon the purchaser to establish the legal necessity.

(ii) The legal necessity pleaded in the plaint is requirement of funds for purchasing tractor and for digging of Well. The pleading has to be substantiated by evidence and no amount of pleadings can substitute the requirement of proof. The deposition of Plaintiff is completely silent on the legal necessity and the alienation by

Defendant No.1 as Karta of the joint family. On the contrary the Plaintiff has deposed that the suit property being Gat No.151 is owned by the Defendant No.1. The deposition is contrary to the recital in the agreement for sale as to the subject property being ancestral joint family property. That being the deposition on record, the Plaintiff has failed to prove the legal necessity and the alienation by Defendant No.1 even if proved being in excess of his undivided share in the ancestral property is invalid.

(iii) Secondly, the Defendant Nos.2 and 3 were also co-parceners and the alienation could be protected if they had consented to the alienation. The case of the Plaintiff is that consent is implied from their presence at the time of the execution of the agreement for sale. The Trial Court has presumed the consent by observing that as the amount of Rs.50,000/ was credited to the bank accounts of Defendant Nos.2 and 3 they were aware of the transaction. The presumption raised by the Trial Court is mere surmise and conjecture and cannot be equated with proof of consent of Defendant Nos.2 and 3 to the alienation. The Appellate Court has rightly noted that if the Defendant Nos.2 and 3 were present at the time of execution of the agreement, their signatures would have been obtained on the agreement. In the absence of the consent of Defendant Nos.2 and 3, the alienation to the extent of their share is invalid.

(B) Absence of readiness and willingness by reason of uncertainty of terms of agreement qua the agreed consideration:

(i) Section 16(c) of the Specific Relief Act, 1963 (unamended) prohibits specific performance of contract in favour of a person who fails to aver and prove that he has performed and is ready and willing to perform the essential terms of the contract which are to be

performed by him.

(ii) The consideration in the agreement for sale is stated to be Rs.70,000/-. The Plaintiff has pleaded in the plaint that the total consideration was fixed at Rs.70,000/- out of which he has paid Rs.50,000/- at the time of execution of agreement for sale. In paragraph 4 of the plaint he pleads that he is ready and willing to pay the balance amount of Rs.20,000/- at the time of execution of the sale deed.

(iii) In his deposition the Plaintiff does not depose about the consideration amount which has been agreed between the parties. He has deposed that he has paid Rs.50,000/- and is ready and willing to pay the balance amount. In cross examination he has pleaded ignorance as to whether the transaction was for consideration of Rs.1,20,000/-. PW-3 has deposed that the agreement was that Rs.1,20,000/- would be paid by the Plaintiff. PW-3 has further admitted in cross examination that it was agreed that Rs.70,000/- would be paid at the time of sale deed. PW-6 who is father of Plaintiff has deposed that Rs.1,20,000/- was the agreed consideration. He has admitted in his cross examination that the sale deed was executed for lesser amount to save expenditure and he has also admitted that the value of suit is wrong as value of suit land is shown at Rs.70,000/-.

(iv) The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that

the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all.

(See Smt. Mayawanti vs Smt. Kaushalya Devi 1990 SCR (2) 350)

(v) The evidence on record does not establish conclusively the agreed consideration between the parties. If the specific performance has to be enforced, the terms have to be certain and the readiness and willingness has to be demonstrated qua the specific terms. Where the obligation of the Plaintiff itself is not certain, there is no question of Plaintiff proving his readiness and willingness to perform his part of contract.

(vi) Apart from the above, PW-6 has deposed that lesser consideration was shown to save expenditure. To put it in simple words, the lesser consideration was shown in the agreement for sale with intent to defraud the revenue authorities. Enforcement of such type of contract would amount to enforcing an illegal transaction and the process of Court cannot be utilised for perpetuating such illegality. The Trial Court despite observing that the Court cannot become party to illegal transaction has thereafter gone ahead and ordered specific performance.

(c) Enforcement of the specific performance of the agreement for sale dated 23rd December, 1988 would constitute creation of fragment:

(i) The agreement for sale dated 23rd December, 1988 is in respect of 1 Hectare 47 Are out of total area of 1 Hectare 63 Are of Gat No.151. By enforcing the agreement for sale, the balance area retained by the Defendants would be only 18 Are land which would

constitute a fragment. Section 8 of The Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (Fragmentation Act) prohibits transfer or partition of land which will result in creation of fragment and Section 9 renders void the transfer or partition of land contrary to the provisions of the Act.

(ii) Mr. Deshmukh, learned counsel for Appellant does not dispute that by virtue of the transfer, fragment would be created, however, he attempted to salvage the situation by contending that the permission given qua the Defendant No.4 can be modified qua the Plaintiff as held by Trial Court. The fallacy of the finding of Trial Court is that the claim of Defendant No.4 is of purchase of entire Gat No.151 and not portion thereof. Enforcement of agreement for sale of the Plaintiff would amount to enforcement of void agreement by reason of Section 9 of Fragmentation Act.

28. As to the execution of possession receipt- Exhibit 70, the Plaintiff seeks the relief of handing over possession in event found out of possession. The agreement for sale dated 23rd December, 1988 does not contain the recital of handing over possession. It was case of the Plaintiff that by virtue of separate possession receipt executed on the same day, the possession was handed over to the Plaintiff. The Appellate Court has noted the deposition of PW-1-Pandurang that the agreement for sale and possession receipt had been prepared by same person Manik Kadam, PW-3 has deposed that possession receipt was not prepared by Manik Kadam and has admitted that the possession receipt was not prepared when agreement for sale was prepared. The Appellate Court has held that possession receipt is not reliable as the entire evidence in respect of the the execution of possession receipt is contrary as regards its place of execution.

29. Even if it is accepted that the possession receipt was signed by the Defendant No.1, the Plaintiff claims to be in possession whereas the Plaintiff's own witness i.e. his father PW-6 has deposed that the possession was delivered to them but they were in possession only for 5-6 months and thereafter they were restrained from entering into the suit land.

30. PW-5 has been examined to prove the possession of the Plaintiff. PW-5 has admitted in cross examination that at the eastern side of the suit land some lands are acquired by the sugar factory and the land of PW-5 is at the northern side of the land of the sugar factory. PW-5 has deposed that he has seen the plaintiff occupying the suit property for about 6 months. The Appellate Court has therefore rightly considered that the plaintiff has not explained as to when he lost the possession of the suit land and continues to insist that he is holding the possession. Nothing has been pointed out from the evidence to demonstrate that as on the date of filing of the suit, the possession was with the plaintiff. The Appellate Court has rightly appreciated the evidence on aspect of possession.

31. It is therefore, clear that as of 17th August, 1991 when PW-6 entered into the witness box, the plaintiff was not in possession of the suit land even if the possession receipt had been executed. The Plaintiff has sought relief of recovery of possession which could be granted under Section 22 of Specific Relief Act, 1963 provided specific performance was ordered.

32. Coming to the decisions cited by Mr. Deshmukh, in decision of Allahabad High Court in the case of ***Satya Narayan vs. Smt. Nanki Dev***, (supra), the allegation was that the promissory note had been

executed by misrepresentation and undue influence. In facts of that case the Court was held that the promiser admitting the execution of the promissory note, the onus is upon the promiser to prove the circumstances that vitiate the consent. In ***Hajrabai and Ors vs. Jadavba***, (supra), the Madhya Pradesh High Court has held that misrepresentation is required to be proved and the burden lies upon the person who alleges the same. There is no quarrel with said propositions of law. However, considering the present case, what is sought is specific performance of the contract and even if the execution is proved, the Court is vested with a discretion whether the order of specific performance or not.

33. The next decision is of the Apex Court in the case of ***Kuppuswami Chettiar vs. Arumugam Chettiar*** (supra) where the Apex Court in facts of the said case held that the document has not vitiated by misrepresentation and the Appellant was well aware of the nature of deed executed and the onus is upon the person to lie misrepresentation to establish the plea. There is no quarrel with the settled position in law but does not assist the case of the Appellant.

34. In case of ***Prem Singh and Ors. vs. Birbal and Ors.*** (supra) the Apex Court held that there is a presumption that a registered document is validly executed and the onus would be in a person who leads evidence to rebut the presumption. This Court has already held that specific performance cannot be granted as the agreement is not valid and enforceable.

35. The next decision is of the Apex Court in the case of ***Bishundeo Narain and Anr. Vs Seogeni Rai and Ors.*** (supra) wherein the Apex Court has held that the general allegations are insufficient even to

amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched. In the present case, although the Defendant No. 1 has not been established the case of fraud, it needs to be noted that the Plaintiff is seeking specific performance of the contract and only valid and enforceable contract can be ordered to be specifically performed.

CONCLUSION:

36. The agreement for sale dated 23rd December, 1998 is not valid and enforceable agreement for the reasons stated in paragraph 27 above and the Plaintiff was thus not entitled to specific performance of the agreement. The Appellate Court on basis of evidence adduced on record has held that on 17th August, 1991 when PW-6 entered into the witness box, the plaintiff was not in possession of the suit land even if the possession receipt had been executed. The Plaintiff has sought relief of recovery of possession which could be granted under Section 22 of Specific Relief Act, 1963 provided specific performance was ordered.

37. The substantial questions of law are accordingly answered against the Appellant. Resultantly, the Second Appeals stands dismissed. In view of the dismissal of the Appeals, Civil/Interim Applications, if any, taken out in these Appeals, does not survive and same is disposed of.

[Sharmila U. Deshmukh, J.]

38. At this stage, request is made by learned counsel for the Appellant for extension of ad-interim relief which has been operating since 6th October, 2015 for a further period of eight weeks. At his

request, interim relief is extended for further period of eight weeks from the date of uploading of the order.

[Sharmila U. Deshmukh, J.]