

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 734 OF 2022
WITH
INTERIM APPLICATION NO. 20542 OF 2022
IN
SECOND APPEAL NO. 734 OF 2022

Shankar Jagannath Pawar

.. Appellant
(Org. Plaintiff)

Versus

Madhav/Mahadev Daulat Pawar & Ors.

.. Respondents
(Org. Defendants)

...

Mr. Nikhil Wadikar a/w Ms. Sejal Jain for the Appellant.

None for Respondent.

...

CORAM : SANDEEP V. MARNE J.

DATE : 10 JANUARY, 2024.

P.C.:-

1) The Appeal is filed challenging Judgment and Order dated 4 December 2015 passed by the Civil Judge, Junior Division, Koregaon in Regular Civil Suit No. 136 of 2005 as well as the Judgment and Decree dated 7 October 2022 passed by District Judge, Satara in Regular Civil Appeal No. 3 of 2016.

2) Appellant/Orig. Plaintiff filed Regular Civil Suit No. 136 of 2005 seeking specific performance of Agreement for Sale dated 16 April 1980. In the plaint, it is Appellant-Plaintiff's case that the agreed consideration as per Agreement dated 16 April 1980 was Rs.4,400/-, out of which Plaintiff paid to the Defendant amount of Rs.4,300/- The balance amount of Rs.100/- was agreed to be paid at the time of execution of the Sale Deed. It is Appellant-Plaintiff's case that along with Agreement for Sale, possession of the suit property was handed over to the Appellant/Orig. Plaintiff which is in his exclusive possession. The Agreement records that the Defendant-Respondents were to obtain necessary permission from Government authorities for execution of the Sale Deed. It is Appellant-Plaintiff's case that it was entirely the responsibility of the Respondents/Defendants to obtain such permission. That the Respondents/Defendants agreed to execute the Sale Deed either after obtaining Government permission or on Chaitra Padava of the year 1982. The Suit was resisted by Respondents/Defendants by filing written statement. Both the parties led evidence in support of their respective cases. The Trial Court however proceeded to dismiss the suit by Judgment and Decree dated 4 December 2015 holding that the suit property was not correctly described, that the Agreement was not proved, that possession was not proved, that readiness and willingness was not proved and that therefore Appellant/Orig. Plaintiff was held to be not entitled for relief of specific performance.

3) Appellant/Orig. Plaintiff approached District Judge, Satara by filing Regular Civil Appeal No. 3 of 2016 challenging the Decree of

the Trial Court. The District Court has however proceeded to dismiss the Appeal by its Judgment and Order dated 7 October 2022. The Appellant/Orig. Plaintiff has accordingly filed the present Second Appeal.

4) I have heard Mr. Wadikar the learned counsel appearing for Appellant/Orig. Plaintiff. He would submit that execution of Sale Deed was contingent upon the Respondents/Defendants obtaining prior permission from Government authorities. That the Respondents/Defendants failed to obtain such permission. That Appellant/Orig. Plaintiff was always ready and willing to perform his part of contract. That readiness implies financial preparedness, which is proved by factum of payment of consideration of Rs.4,300/- out of agreed consideration of Rs.4,400/-. That readiness is always backed by willingness which is to be inferred from the conduct of Appellant/Orig. Plaintiff. That in the present case there is nothing on record to indicate that Appellant/Orig. Plaintiff was not willing to have the Sale Deed executed in his favour. That once readiness and willingness is established, grant of decree for specific performance is mandatory. In support of his contentions, Mr. Wadikar would rely upon Judgment of the Apex Court in **Shrimant Shamrao Suryavanshi & Anr.**¹ and **M/s. J. P. Builders and Anr.**²

5) Mr. Wadikar would submit that the Trial Court and the First Appellate Court have erred in accepting the defence of the

¹ Shrimant Shamrao Suryavanshi & Anr. Vs. Pralhad Bhairoba Suryavanshi (Dead) By Lrs. And Ors. (2002) 3 SCC 676.

² M/s. J. P. Builders and Anr. Vs. A. Ramadas Rao and Anr. (2011) 1 SCC 429.

Respondents/Defendants that the transaction is that of loan. Referring to the provisions of Section 92 of the Indian Evidence Act, Mr. Wadikar would submit that the burden of proof of assertion of loan transaction would rest squarely on the shoulders of the Respondents/Defendants.

6) So far as the aspect of the possession is concerned, Mr. Wadikar would submit that once Agreement for Sale records handing over of possession, it is not necessary for the Appellant/Org. Plaintiff to produce any other document to prove his possession. That possession of the suit property was handed over to the Plaintiff simultaneously with the execution of Agreement of Sale. That therefore the Trial Court and the lower Appellate Court have committed an error in expecting the Appellant/Org. Plaintiff to produce additional evidence to prove his possession. Mr. Wadikar would therefore submit that substantial questions of law are involved in the present Appeal, warranting setting aside the orders passed by the Trial and the first Appellate Court.

7) I have considered the submissions canvassed by Mr. Wadikar and have gone through the judgments of the Trial Court and the First Appellate Court. Plaintiff's suit was for specific performance of the Agreement for Sale dated 16 April 1980. It was agreed in the Agreement that the Sale Deed was to be executed after procurement necessary permissions from Government authorities. Plaintiff has pleaded in the plaint that the Defendants agreed to execute the Sale Deed either after procurement of permissions or on Chaitra Padava (festival usually falling in March or April of each year) of 1982. Thus,

as per the pleaded case in the plaint, the outer limit for performance of the contract was specified as Chaitra Padava of 1982. The contingency of procurement of Government permissions was applicable in respect of the period prior to the Chaitra Padava of 1982. It is admitted position that the Defendants did not obtain the requisite permission for sale of suit property in the name of Plaintiff. This would imply that the alternate date for performance of contract was Chaitra Padava of 1982. Under Article 54 of the Limitation Act, the time to file suit for specific performance of contract begins to run from Chaitra Padava of 1982. However, Plaintiff waited for 25 long years after execution of Agreement for Sale to institute R.C.S. No. 136 of 2005 on 24 October 2005. Considering this conduct exhibited by Plaintiff, the Trial Court has arrived at a finding of fact that he was not neither willing nor ready to perform the part of his contract. The Trial Court has refused to believe the alleged oral agreement sought to be pleaded in para 6 of the plaint. No patent error can be traced in the findings recorded by the Trial Court in this regard.

8) Plaintiff not only maintained silence for over 25 years but also lost original Agreement for Sale during the interregnum. The Trial Court has also taken note of the fact that the amount of Rs.4,300/- was paid to the Defendants in the year 1978 i.e. two years before execution of the Agreement for Sale on 16 April 1980. After considering the entire conspectus of the case, the Trial Court has held that the Plaintiff was not ready or willing to perform his part of the contract and that therefore the relief of specific performance is declined in his favour.

9) Mr. Wadikar has relied upon Judgment of the Apex Court in ***M/s. J. P. Builders*** (supra) in which it is held in Para 9 are as under:

“9. The words “ready” and willing” imply that the person was prepared to carry out the terms of the contract. The distinction between “readiness” and “willingness” is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

There can be no dispute about the proposition that readiness is usually backed by willingness. Mr. Wadikar is at pains to urge that payment of almost the entire amount of consideration is sufficient factor in inferring financial readiness on Plaintiff’s part. Here the amount of Rs. 4,300/- is proved to have been paid to Defendants two years before the execution of the Agreement for Sale. The Trial Court has therefore refused to believe that the said payment was towards consideration for purchase of the suit property. Therefore, Plaintiff’s readiness cannot be inferred only on the basis of such payment. His conduct in maintaining silence for over 25 long years is sufficient factor to infer that he was neither ready nor willing to perform his part of the contract.

10) Mr. Wadikar has contended that even if relief of specific performance was to be declined, Plaintiff’s possession over the suit property ought to have been protected. He has placed reliance on the Judgment of the Apex Court in ***Shrimant Shamrao Suryawanshi*** (supra) in which it is held as under:

“15. The Special Committee's report which is reflected in the aims and objects of amending Act 1929 shows that one of the purposes of enacting Section 53-A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for specific performance has expired. In that view of the matter, Section

53-A is required to be interpreted in the light of the recommendation of Special Committee's report and aims, objects contained in amending Act 1929 of the Act and specially when Section 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under Section 53-A even if the period of limitation to bring a suit for specific performance has expired.

16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are:

- 1) there must be a contract to transfer for consideration any immovable property;*
- 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;*
- 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;*
- 4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;*
- 5) the transferee must have done some act in furtherance of the contract; and*
- 6) the transferee must have performed or be willing to perform his part of the contract.*

17. We are, therefore, of the opinion that if the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under Section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract has barred by limitation.”

11) The Trial Court has however held that the Plaintiff could not prove that he received possession of the suit property by virtue of Agreement for Sale. One of the factors taken into consideration by the Trial Court for refusal to believe theory of possession by Plaintiff is reliance on revenue records. The Trial Court has taken note of the fact that as on decision of the Suit on 4 December 2015, the names of Defendants continue to be reflected in the revenue records. By the time the Suit was dismissed, period of 35 long years had lapsed from the execution of Agreement for Sale and alleged handing over of possession. It is difficult to believe that for 35 long years

Appellant/Orig. Plaintiff did not get his name mutated to the revenue records if he remained in possession of the suit property. Even if revenue records reflecting names of Defendants are to be ignored, Plaintiff ought to have produced some evidence to show that during the period of 35 long years he was in possession of the property or that he cultivated the same. The Trial Court has considered the entire evidence for recording a finding of fact that Plaintiff is not in possession of the suit property. The said finding of fact is accepted by the First Appellate Court. I do not find any reason to interfere in the said finding of fact.

12) Reliance of Mr. Wadikar on provisions of Section 92 of the Indian Evidence Act does not take his case any further. Even if the Agreement dated 16 April 1980 is treated as an Agreement for Sale and not as transaction of loan, Plaintiff would still not be entitled to decree of specific performance on account of silence on his part for the last 25 long years.

13) After taking into consideration the entire conspectus of the case, I do not find any serious infirmity in the view taken by the Trial Court and the First Appellate Court in holding that Plaintiff did not file the suit for specific performance within reasonable time. No substantial question of law is involved in the present Appeal. Time has come for Appellant/Orig. Plaintiff to accept the reality that he can no longer purchase the suit property, the Agreement in respect of which was executed 44 years ago. Time has come to put an end to the entire litigation. I am therefore not inclined to admit the Second Appeal in

absence of any substantial question of law. Second Appeal is accordingly **rejected**.

14) In view of disposal of Second Appeal, Interim Application No. 20542 of 2022 does not survive and the same is also disposed of.

[SANDEEP V. MARNE J.]