



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.277 OF 2021

Appellant : Shishupal s/o Krishnani Sontakke,
 (Ori. Defendant on R.A.) Aged 51 Years, Occupation : Service,
 R/o Jai Bhole Nagar, Village Khaparkheda,
 Tahsil and District Nagpur.
 – Versus –

Respondent : Govind Pandurangji Parate,
 (Ori. Plaintiff on R.A.) Aged 58 Years, Occupation : Private Service,
 R/o Near Chor Baoli Vihar, Om Kirana Stores,
 Nagpur : 440 022.

 Ms. S.N. Tapdiya, Advocate for the Appellant.
 Mr. B.K. Pal, Advocate for the Respondent.

CORAM : **M.W. CHANDWANI, J.**
DATE : **18th OCTOBER, 2024.**

ORAL JUDGMENT :

The Court vide it's order dated 30/09/2021 framed the following substantial questions of law :

1. *Whether the learned lower Appellate Court has rightly considered the point of impossibility for specific performance?*
2. *Whether the Appellate Court was legally correct even in passing the decree of specific performance of contract, when admittedly Plot No.106 has never been transferred in favour of the appellant and consequently the agreement in question has suffered from the doctrine of frustration and cannot be given effect thereto?*

3. *Whether the judgment and decree passed by the Appellate Court can be treated as legal and justified particularly in the legal proposition of equity to be considered while granting a decree of specific performance of contract?*

02. By consent of both the parties, the appeal is heard at the stage of admission.

03. **Admit.**

04. The respondent (original plaintiff) filed a suit against the appellant (original defendant) for specific performance of contract on the basis of agreement dated 23/07/2007 whereby the defendant agreed to sell Plot Nos.105 and 106 (*hereinafter referred to as 'suit property' for short*), which was to be allotted to the defendant in the layout of Parampujya Dr. Babasaheb Ambedkar Memorial Co-operative Housing Society Ltd., Nagpur (*hereinafter referred to as 'Society' for short*), for a total consideration of Rs.3,70,000/-. At the time of the agreement, an earnest amount of Rs.25,000/- was paid to the defendant. The plaintiff came up with a case before the trial Court that the defendant has committed default in performance of the contract. Since, the plots are a part of unauthorized layout and they are yet to be regularized, it was the duty of the defendant to get the suit property regularized. Rather, the suit property was to be conveyed

in favour of the defendant. Therefore, the plaintiff cannot make payment of remaining part of the consideration and perform his part of the contract. Even after passage of a considerable time, no steps were taken to that effect and therefore, the plaintiff filed the suit for specific performance of contract.

05. Apart from the plea that the suit agreement was executed for securing the hand-loan, the defendant came up with a case that the agreement was contingent and only upon allotment of plots, sale-deed was to be executed. The trial Court after framing necessary issues and hearing the suit on merits, partly decreed the suit of the plaintiff. The trial Court held that the plaintiff was ready and willing to perform his part of contract, but the defendant failed to perform his part of contract. However, considering the fact that the suit plots are in an unauthorized layout, the trial Court directed the defendant to refund the earnest amount of Rs.25,000/- to the plaintiff. As the suit was partly decreed, the plaintiff carried the matter in appeal. The appeal filed by the plaintiff came to be allowed and the defendant was directed to execute the sale-deed of the suit property in favour of the plaintiff. Therefore, feeling aggrieved by the findings of the appellate Court, the original defendant filed the present appeal.

06. Ms. S.N. Tapadiya, learned Counsel appearing for the appellant (original defendant) submitted that according to her, the agreement to sell

suit Plot Nos.105 and 106 for a consideration of Rs.3,70,000/- was subject to allotment of the suit property by the Society in favour of the defendant and after getting the suit plot registered in the name of the defendant, the sale-deed was to be executed by the defendant in favour of the plaintiff. The defendant was allotted only one plot i.e. Plot No.105 by the Society and therefore, the defendant was not able to perform his part of the contract in its entirety as per the agreement dated 23/07/2007. According to her, there was a contingent agreement between the parties that on allotment of both the plots by the Society in favour of the defendant, the defendant would execute the sale-deed of the plots in favour of the plaintiff. Since, the defendant could get only one plot, performance of the contract became impossible. The entire consideration of Rs.3,70,000/- was for two plots and therefore, the consideration for individual plots was not agreed between the parties. The consideration is inseparable and therefore, even the part of the contract, i.e. for a plot, cannot be specifically enforced. The agreement suffers from doctrine of frustration and cannot be given effect thereto. This aspect has not been considered by the appellate Court and erroneously directed the defendant to execute the sale-deed in favour of the plaintiff in respect of Plot Nos.105 and 106.

07. Alternatively, she further submitted that the defendant is a poor person and he has been allotted only one plot. If the defendant is directed to execute the sale-deed of Plot No.105 specifically, then more hardship will be caused to the defendant than the plaintiff. It is also argued that since there is a stiff increase in the rates of the properties. As of today the market value of the plot which was agreed to be sold in the year 2009 is touching the sky. Therefore, directing the defendant to execute the sale-deed for a consideration which was agreed in the year 2009, on acceptance earnest money of a meager amount of Rs.25,000/-, will be inequitable. Therefore, she submitted that the judgment and decree of the appellate Court be set aside.

08. *Per contra*, learned Counsel Mr. B.K. Pal appearing on behalf of the respondent (original plaintiff) submitted that though the contract is a contingent contract, it can be executable partly. Since, the defendant has got only one plot instead of two, in such circumstances, he can very well execute the sale-deed of the said plot which is allotted to him. According to him, the general principle is that if the consideration amount of each plot has not been mentioned, then the consideration of each plot can be decided on the basis of pro-rata calculations. According to him, the size of both the plots were one and the same, therefore, it is to be presumed that half of the total consideration will be the consideration for one plot.

09. The learned Counsel for the respondent further submitted that Section 12(3) of the Specific Relief Act, 1963, permits the Court to direct the party in default to perform specifically, so much of his part of the contract as he can perform, provided that the other party pays or has paid the agreed consideration for the whole of the contract and relinquishes all claims to the performance of remaining part of the contract. So according to him, even if the consideration for each plot cannot be segregated from the entire consideration, the plaintiff is ready to relinquish all his claims to performance of remaining part of the contract. In other words, the learned Counsel for the respondent submitted that on payment of the entire consideration of Rs.3,70,000/-, the defendant can be directed to execute the sale-deed of Plot No.105 in favour of the plaintiff.

10. Having heard the learned Counsel for the appellant as well as the respondent, having gone through the record and proceedings of the trial Court and perusal of the impugned judgment, it appears that the defendant has agreed to sell Plot No.105 and 106 which were to be allotted to the defendant. It is a matter of record that during pendency of the suit, the defendant could get only one plot i.e. Plot No.105, that too in the sanctioned layout. The same could not be brought to the notice of the trial Court and therefore, the trial Court instead of passing a decree for specific performance

of contract, directed the defendant to refund the consideration of Rs.25,000/-. However, the appellate Court after going through the sale-deed executed by the Society in favour of the defendant found that the layout was already sanctioned in the year 1986 and since the contingency of allotment of plot mentioned in the agreement does not remain, the agreement is enforceable. However, the learned appellate Court failed to consider the aspect that Plot No.106 was never allotted to the defendant and erroneously directed the defendant to execute the sale-deed in respect of Plot No.106 as well in favour of the plaintiff. Since, Plot No.106 was not assigned by the Society in favour of the defendant, it is impossible for the defendant to execute the sale-deed of Plot No.106 and therefore, that part of the agreement suffers from doctrine of frustration and cannot be given effect thereto.

11. Evidently, only Plot No.105 has been assigned to the defendant by way of sale-deed by the Society. The defendant is competent to execute the sale-deed in respect of Plot No.105. The question here is, whether the decree for specific performance of the part of the contract can be passed? Section 12(3) and (4) of the Specific Relief Act, 1963 will be relevant for the purpose of this case, which is reproduced here.

12. Specific performance of part of contract.—

(3) Where a party to a contract is unable to perform the whole of his

part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b) [pays or has paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

12. In the case of **Rachakonda Narayana vs. Ponthala Parvathamma and another¹**, the Apex Court in paragraph 8 of the decision has held as under:

“8. A perusal of sub-section (3) of [Section 12](#) shows that the first part of the said provisions mandates refusal of specific performance of a contract on certain conditions. However, latter part of the provisions permits a Court to direct the party in default to perform specifically so much of his part of the contract as he can perform if the other party pays or has paid the agreed consideration for the whole of the contract and relinquishes all

1 (2001) 8 SCC 173

claims to the performance of the remaining part of the contract and all the rights to compensation for the loss sustained by him. If a suit is laid by the other party, the court may direct the defaulting party to perform that part of the contract which is performable on satisfying two preconditions, i.e., (i) the plaintiff pays or has already paid the whole of the consideration amount under the agreement and that (ii) plaintiff relinquishes all claims to the performance of other part of the contract which defaulting party is incapable to perform and all rights to compensation for loss sustained by him. Thus, the ingredients which would attract specific performance of the part of the contract, are : (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent and (ii) the other party to an agreement must, in a suit for such specific performance, either pays or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of other part of contract which defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of other party.”

13. In the present case, the plaintiff has submitted that he is ready to pay the entire consideration, which is fixed for whole part of contract and also is ready to relinquish all claims of remaining part of the contract. Therefore, the ingredients of Section 12(3) of the Act are very well present. Even otherwise, the part of contract i.e. to execute sale-deed of Plot No.105 stands on a separate and independent footing than another part of contract which cannot be performed and therefore, the specific performance of contract in respect of Plot No.105 can be directed. So far as equity is concerned,

considering the facts and circumstances of the case, the equity does not lie in favour of the defendant. Therefore, I see no difficulty in directing the defendant to perform the part of contract.

14. It is a matter of record that there has been a stiff rise in the market price of the immovable property, particularly, since the last decade. The agreement in question was entered into between the parties on 23/07/2007 i.e. almost 17 years ago. It is also a matter of record that out of Rs.3,70,000/-, only Rs.25,000/- was given as an earnest amount. To strike a balance between the parties and particularly, considering the manifold rise in prices of immovable property, in my view, the respondent can be directed to pay Rs.6.00 lakhs towards entire consideration for sale of Plot No.105. It is informed that the balance consideration of Rs.3,45,000/- is already deposited in the trial Court by the plaintiff.

15. In view of the above, the judgment and decree passed by the learned appellate Court is modified as under :

- I. The appeal is partly allowed.
- II. The appellant is directed to execute and register the sale-deed of Plot No.105 within two months from today in favour of the respondent on accepting Rs.2,30,000/- (Rupees Two Lakhs

Thirty Thousand Only) apart from the amount deposited in the trial Court by the respondent.

- III. If the appellant fails to execute the sale-deed, the respondent is entitled to get the sale-deed executed through due process of Court by depositing the remaining amount of consideration.
- IV. The appellant shall be entitled to withdraw the balance consideration amount of Rs.3,45,000/- deposited by the respondent along with the interest accrued thereon.
- V. There shall be no order as to costs.

(M.W. CHANDWANI, J.)

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