



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

SECOND APPEAL NO. 3 OF 2018

APPELLANTS : 1. Pushkar s/o Prabhakar Tagde,
(Ori. Defendants) Aged about 35 years, Occ : Service

2. Smt. Kunda wd/o Prabhakar Tagde,
Aged about 73 years, Occ : Housewife,

Both are R/o : Main Road, Madhav Nagar,
Near Shegaon Naka, Telhara, Tah : Telhara,
Distt : Akola - 444 108
At Present : R/o : Flat No.502, Bhakti
Elegance, In front of Symbiosis Hostel,
Near IVY Studio, Sakore Nagar,
Viman Nagar, Pune - 411 014.

(On R.A.)

V E R S U S

RESPONDENT : Nitin s/o Divakar Joshi,
(Ori. Plaintiff) Aged about 37 years, Occ : Business,
R/o : Main Road, Madhav Nagar,
Near Shegaon Naka, Telhara,
Tah : Telhara, Distt : Akola 444 108.

(On R.A.)

Shri S. V. Sohoni, Advocate for appellants.
Shri N. R. Tekade, Advocate for respondent-sole.

CORAM:- SANJAY A. DESHMUKH, J.
DATED : 18/07/2024.

ORAL JUDGMENT :

1. This second appeal is preferred against the Judgment and Decree dated 17/03/2017 passed by the First Appellate Court, Akot, Dist. Akola in Regular Civil Appeal No.29/2008 (Old Regular

Civil Appeal No.71/2007), which was preferred against the Judgment and Decree dated 28/03/2007 passed by Joint Civil Judge, Senior Division, Akola in Special Civil Suit No.131/2004. The suit for specific performance of contract was dismissed. However, the appeal against it was allowed and suit was decreed.

2. The brief facts of the case are as under :-

The subject matter of the suit is Shop / Block admeasuring 11.15 square meters situated in Field Survey No.65 in village Satkagbad. The agreement to sell was executed between the plaintiff and defendant No.1 to which defendant No.2 who is mother of defendant No.1 was not party. However, later on, she signed that agreement and endorsed that she got Rs.95,000/- out of total consideration of Rs.1,45,000/-.

3. The defence of the defendants was that only part of the shop till the roof was agreed to be sold. However, from roof upto the sky, the ownership would remain with the defendants.

4. Learned Trial Court held that contract of sale is valid, however defendants have not avoided to execute the sale deed and they did not commit breach of contract of sale. The First Appellate Court held that the plaintiff was ready and willing to perform his

part of contract. The defendants failed to establish incorrect description and the identity of the suit property. The suit was decreed.

5. The following substantial question of law is formed :-

"The trial Court in para-30 of its judgment having found that the defendant No.1 alone did not have title to the suit property for executing an agreement of sale dated 01-07-2002 and therefore having directed refund of earnest amount, whether the appellate Court was legally justified in passing a decree for specific performance without recording a finding that the defendant no.1 was the sole owner of the suit property ?"

6. Learned advocate for the appellants during argument pointed out a Para No.30 of the Judgment of the Trial Court in which the Trial Court has held that the suit property is an ancestral property of father of defendant No.1 and husband of defendant No.2. The defendant No.1 is having three sisters. Therefore, contract of sale is illegal because three sisters have not agreed to sell the suit property to the plaintiff. Therefore, it was not concluded and legal contract.

7. Learned advocate for the appellants further pointed out in Para No.11 of the impugned Judgment of the First Appellate Court in which it is observed that what rights would be acquired under the contract would be the right available with defendant.

8. Learned advocate for the appellants is relying upon the Authority in the case of Pemmada Prabhakar and others Vrs. Youngmen's Vysya Association and others, reported in 2014 (5) ALL MR 921. Para No.33 reads as under :-

"33. Point No. 3 is also answered in favour of the defendants for the following reasons:-

It is an undisputed fact that the plaintiffs have not approached the Trial Court with clean hands. It is evident from the pleadings of the Agreement of Sale which is produced for the decree for specific performance of Agreement of Sale as the plaintiffs did not obtain the signatures of all the co-sharers of the property namely, the mother of the defendants, the third brother and 3 sisters. Therefore, the agreement is not enforceable in law as the persons who have executed the sale deed, did not have the absolute title of the property. Apart from the said legal lacuna, the terms and conditions of the Agreement of Sale for payment of sale consideration agreed to be paid by the first plaintiff in installments within the period stipulated as indicated above were not paid. The First Appellate Court and the High Court have not exercised their power under [Section 20\(2\)](#) of the Specific Relief Act which by itself is the substantial question of law which fell for consideration before the High Court as the First Appellate Court failed to consider this important aspect of the matter and exercised its power while determining the rights of the party, particularly, in the light of the unenforceable contract between the plaintiffs against the defendants as all of them are not parties to the Agreement of Sale document (Ex.-A1) and the executants viz. defendant Nos. 1 and 2 have not acquired absolute title to the property in question. Therefore, the impugned judgment is vitiated and liable to be set aside."

9. Learned advocate for appellants lastly submitted that in the absence of sisters, who have right in the suit property, a decree granting specific performance of contract is absolutely illegal and not sustainable. He lastly prayed to allow this appeal with costs.

10. Learned advocate for the respondent pointed out that defendants have not raised defence of non-joinder of necessary party in the Trial Court specifically. Therefore, no such issue as to non-joinder of necessary party was cast by the Trial Court. The said issue was also not raised in the Trial Court. The First Appellate Court in its reason and finding held and decided the nature of suit property and rights over it elaborately in Para Nos.15 and 16. That was the only issue raised by the defendants which was decided on merit. He lastly submitted to dismiss this appeal as there is no any substantial question of law to be decided. Learned advocate for the respondent is relying upon the following case laws :-

- 1] **2003 AIR (SC) 1905**
(Bondar Singh and others Vrs. Nihal Singh)
Para No.7 reads as under :-

"7. As regards the plea of the sub-tenancy (shikmi) argued on behalf of the defendants by their learned counsel, first we may note that this plea was never taken in the written statement the way it has been put forth now. The written statement is totally vague and lacking in material particulars on this aspect. There is nothing to support this plea except some alleged revenue entries.

It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into. Therefore, in the absence of a clear plea regarding sub-tenancy (shikmi) the defendant cannot be allowed to build up a case of sub-tenancy (shikmi). Had the defendants taken such a plea it would have found place as an issue in the suit. We have perused the issues framed in the suit. There is no issue on the point."

11. Perused the impugned Judgment. The written statement of the defendants shows that they have admitted execution of a contract of sale of suit property which is signed by the defendant No.2 later on. No any documentary evidence is produced on record to show that they are entitled to share in the suit property by succession. Merely stating that it is ancestral property of the father is not sufficient defence. The said plea is not acceptable in the absence of any such evidence as per ratio laid down in the case of **Bondar Singh** (supra). The natural evidence of recording of the names of all the sisters to the record of rights after death of father to the suit property is not produced on record.

12. The specific performance is at the discretion of Court. As per Section 20 of the Specific Relief Act, it is expected that the parties should come before the Court with clean hands. The defendants have come with plea of the joint ownership over the suit property and that sisters are heirs and successors of the suit property as per Section 8 of the Hindu Succession Act. No such

evidence is brought on record to show that sisters of the defendant No.1 have right in the suit property. Therefore, the First Appellate Court was right in passing a decree for specific performance of contract. No question arises for recording of the finding on the alleged defence raised in this appeal. The discretion under Section 20 of the Special Relief Act, 1963 exercised by the First Appellate Court is sound, legal and correct and no interference is warranted in it. Considering all these aspects, there is no substance in the grounds of objections raised and argued in this appeal. Therefore, the authority of Pemmada Prabhakar and others cited supra relied upon by the learned advocate for the appellants is not helpful to the appellants as the legal rights of sisters of appellants over suit property are not established. The Judgment and decree passed by the First Appellate Court is legal and correct. No interference is warranted in it. Hence, substantial question of law is answered that First Appellate Court was right in passing decree for the specific performance of the contract. The appeal being devoid of merit deserves to be dismissed.

13. Though there is no substance in the grounds of appeal, the respondent was compelled to face this appeal. The respondent must have incurred some expenses for it. He must be compensated by awarding costs of Rs.10,000/- to be paid by the appellants.

14. The appeal is dismissed.
15. The appellants are directed to pay costs of Rs.10,000/- to the respondent within three months. If the said amount is not deposited in the Trial or Executing Court within three months, the respondent is entitled to 9% per annum interest on the said amount.
16. Record and Proceedings be sent to the Trial Court.
17. Appeal is disposed.

[SANJAY A. DESHMUKH, J.]