



This judgment has been corrected pursuant to the speaking to minutes of order dated 20/08/2025

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 72 OF 2006
WITH CIVIL APPLICATION 12990 OF 2024**

Sow. Mangala w/o Subhash Sangewar
Age : 35 yrs., Occu. : Household,
R/o Gajanan Nagar, Karegaon Road,
Parbhani, Dist. Parbhani.

Through G.P.A. of
Shri. Subhash s/o Kishanrao Sangewar,
R/o Gajanan Nagar, Karegaon Road,
Parbhani, Dist. Parbhani.

... APPELLANT
(Ori. Plaintiff)

VERSUS

1. Sow. Kusum w/o Suryakant Yannewar,
Age : 35 years, Occu.: Household,
Affairs r/o Anandnagar, Parbhani.
2. Chairman Shantiniketan Grahanirman
Society Taran Sanstha
r/o In front of S.T. workshop, Gangakhed Road,
Parbhani.
3. Manager,
Maharashtra State District Co-operative
Housing Finance Bank,
Umrikar's Building, Near Civil Hospital,
Parbhani.

... RESPONDENTS
(Ori. Defendant Nos.1 to 3)

Mr. S. B. Bhapkar, Advocate for the Appellant
Mr. R. F. Totala a/w Mr. S. V. Lohiya, Advocate for Respondent No.1
Mr. S. K. Chavan, Advocate for Respondent No.2
Ms. Rekha Choudhari h/f Mr. S. S. Choudhari, Advocate for Respondent
No.3.

CORAM : R. M. JOSHI, J.
RESERVED ON : 13th AUGUST, 2025
PRONOUNCED ON : 18th AUGUST, 2025

JUDGMENT :-

1. This Second Appeal is filed under Section 100 of the Code of Civil Procedure (for short 'CPC') takes exception to the judgment and decree passed in R.C.S. No. 132/1999 dated 22/07/2004, whereby the suit filed by the Plaintiff for specific performance of the contract is dismissed and counter claim by the Defendants for the possession of the suit property is allowed and confirmation thereof in R.C.A. No. 112/2004 by judgment dated 24/11/2005.

2. Parties are referred to as 'Plaintiff' and 'Defendants' for the sake of convenience.

3. The facts as they appear from the record indicate that Defendant No.1 is the owner of the suit house. By an agreement dated 11/03/1994, she agreed to sale the suit house to Plaintiff for total consideration of Rs.80,000/-. Further admittedly at that time of execution of the agreement to sale a sum of Rs.40,000/- was paid by Plaintiff the Defendant No.1. It was a term in the agreement that the

balance consideration of Rs.40,000/- shall be paid in 80 equal monthly installment of Rs.500/- per month. The Plaintiff paid 16 installments and a total sum of Rs.8,317.40 was paid to Defendant No.2. However, thereafter Plaintiff did not pay the amount of installment on the ground that Defendant is not repaying the loan in respect of the suit house. The Plaintiff therefore, addressed notice dated 18/01/1996 making such allegation and calling upon Defendant No.1 to accept the entire balance consideration and to execute the sale deed. Defendant No.1 did not respond the said notice. The suit came to be filed for specific performance of contract on 20/04/1999. Plaintiff has deposited the balance consideration before the Trial Court during the pendency of the suit.

4. Trial Court framed issues vide Exhibit 21 and the burden was cast upon the Plaintiff to prove agreement to sale and willingness and readiness to perform her part of the contract in respect of the counter claim Defendant No.1 was called upon to prove that Plaintiff has failed to perform the contractual obligation and hence, she is entitled for recovery of the possession of the suit house from Plaintiff. Parties led oral as well as documentary evidence. On behalf of the Plaintiff, Plaintiff's husband Subhash was examined at Exhibit 34. Another witness Ganesh Ghuge (Exhibit 41) is examined in respect of the proof of agreement to sale.

Defendant No.1 entered into the witness box and deposed at Exhibit 48 and also led evidence of Munjaji (Exhibit 52) and Anil More (Exhibit 54). Defendant Nos.2 and 3 did not lead any evidence.

5. After hearing both sides, the Trial Court by impugned judgment and decree dated 22/07/2004 dismissed the suit and decreed counter claim. Being aggrieved by the said judgment and decree, Plaintiff preferred R.C.A. No. 112/2004. Since the said Appeal is dismissed, hence, this Second Appeal.

6. This Court by order dated 02/03/2006 has framed following substantial question of law:

(i) Whether the Courts below committed manifest error in dismissing the suit for specific performance of contract even though the time was not the essence of the contract as per terms of the contract ?

(ii) Whether the Courts below committed manifest error in passing the decree of restoration of possession to the defendant No.1, without directing her to refund the earnest amount received by her?

(iii) Whether the Courts below committed manifest error in holding that the plaintiff-appellant was not ready and willing to perform the contract by paying the balance

amount?

(iv) Whether the Courts below committed manifest error in holding that the specific performance of contract would not be granted in favour of the plaintiff-appellant because the property was mortgaged with respondent No.3, inspite of the terms of contract between the parties?"

7. Learned Counsel for the Plaintiff submits that the Courts below have committed error in dismissing the suit for the reason that the Plaintiff has not entered into the witness box and instead examined her husband. It is his submission that Trial Court has also committed error in not considering the notice dated 18/01/1996 (Exhibit 35) issued by the Plaintiff to Defendant No.1 calling upon her to accept the entire balance consideration and to execute the sale deed. It is his further submission that though such offer was made as back in the year 1996, the Appellate Court has committed error in holding that such offer was made for the first time during the cross-examination of Defendant No.1. Thus, according to him is a perverse finding being contrary to the evidence on record and hence, deserves interference. It is his further submission that out of the consideration of Rs.80,000/-, half of the amount i.e. Rs.40,000/- is paid at the time of execution of agreement to sale and remaining amount was not paid for the reason that Defendant No.1 was not repaying the loan and that the suit property was mortgaged. It is his

submission that the offer made by the Plaintiff to Defendant No.1 to accept the entire consideration itself indicates her willingness and readiness to perform part of the contract. Thus, it is his contention that the suit deserves to be decreed and consequently, counter claim needs to be dismissed. Without prejudice to the afore stated submission it is his argument that in case this Court holds that no decree of specific performance can be granted, the earnest money be directed to be refunded to the Plaintiff, so also the amount deposited in the Court of the balance consideration be permitted to be withdrawn along with interest accrued thereon.

8. Learned Counsel for Defendant No.1 submits that in case of the suit for specific performance of contract, Plaintiff is required to prove that at the point of time Plaintiff was ready and willing to perform the of the contract and then only Plaintiff is entitled to seek decree of specific performance. It is further submitted that in the instant case, there was no condition in the agreement to sale that Rs.500/- received by the Defendant No.1 would be deposited in the bank towards repayment of the loan. In absence of any such condition, there was no justification for Plaintiff not paying the installments after first 16 installments. It is also argued that though the last installment was paid in all around June-July, 1995, however, the notice was issued admittedly after six months. It is

his further submission that when the Defendant No.1 has not responded to the said notice, it was obligatory on the part of the Plaintiff to file suit for specific performance of contract immediately. It is his submission that the suit has been filed belatedly in April, 1999. Thus, according to him the conduct of the Plaintiff disentitles her to seek decree of specific performance of contract. It is further argued that once the Defendant No.1 has established that the Plaintiff has failed to perform her part of contract, Defendant No.1 is entitled for the possession of suit property.

9. As far as non examination of Plaintiff herself is not fatal to her case, since on her behalf her husband led evidence. There is no dispute made with regard to his personal knowledge in respect of the facts involved in this case. In view of Section 120 of the Evidence Act, husband is competent witness of Plaintiff and therefore, non examination of Plaintiff, would not be sufficient to dismiss suit. The entire evidence led by Plaintiff, however, is required to be taken into consideration to decide fate of her suit.

10. Perusal of the evidence on record indicates that execution of agreement to sale dated 11/03/1994 for sale of suit house is not in dispute. The agreed consideration between the parties is Rs.80,000/-. Out of total consideration, a sum of Rs.40,000/- is paid by way of

earnest money at the time of execution of agreement. The agreement (Exhibit 35) indicates that the balance amount of consideration was to be paid by the Plaintiff to Defendant in 80 equal monthly installments of Rs.500/- per month. The said agreement does not indicate that it was a condition of the contract that the said amount of Rs.500/- paid by the Plaintiff would be deposited with the bank where the suit house is mortgaged. Admittedly, out of Rs.40,000/- a sum of Rs.8,317.40 was paid by way of installments and balance amount of Rs.31,682.60 remain unpaid.

11. Considering the date of execution of agreement to sale, and in view of the fact that admittedly first 16 installments were paid, in or around June-July, 1995 last installment came to be paid. However, admittedly the notice is issued to Defendant only after six months therefrom i.e. on 18/01/1996. Defendant No.1 does not dispute the receipt of the said notice, however, there is nothing on record to indicate that Defendant No.1 has accepted the contention of the Plaintiff. It is pertinent to note that the agreement to sale does not bear recital that Rs.500/- per month paid by the Plaintiff to the Defendant would be deposited in the bank against the repayment of the loan. Thus by issuing notice dated 18/01/1996 and by offering to pay the entire balance consideration, the Plaintiff had sought novation of the contract.

Defendant No.1 having not accepted the same, the terms of the contract i.e. agreement to sale dated 11/03/1994 remained unchanged.

12. Now, question arises as to whether the Plaintiff can be said to be ready and willing to perform his part of the contract during the entire period. The law on this issue is settled to say that the Plaintiff is required to plead and prove his readiness and willingness to perform his part of the contract right from the execution of agreement till the finalization of the decree. The non compliance of terms of agreement by Plaintiff also would be relevant. In such position of law, the facts on record indicate that for about six months Plaintiff did not pay any installment as agreed and thereafter offer the entire amount to there Defendant. Thus, clearly there is breach of condition of the agreement on the part of the Plaintiff. Merely because the Plaintiff offers the entire consideration subsequently, that would not wipe out the effect of non compliance of the contract by the Plaintiff for a substantial period of six months.

13. Apart from this, it is necessary to take note of the fact that though it is the case of the Plaintiff that Defendant No.1 did not respond to the notice dated 18/01/1996, however, the suit has been filed after lapse of period of three years therefrom. Notice is dated 18/01/1996, whereas the suit is filed on 20/04/1999. The conduct of the Plaintiff of

filing suit for specific performance of the contract belatedly also disentitle her to seek specific performance of contract.

14. The law on the point of the time being not essence of the contract in case of sale of immovable property is no more *res integra*, however, at the same time the Plaintiff cannot be permitted to sleep over is right and to file the suit at the end of the period limitation. Herein this case, Plaintiff was in the possession of the suit property. She has failed to comply with the terms of the contract and even after issuance of notice in the year 1996, the suit came to be filed after three years i.e. in the years 1999. In such case, though the time is not essence of the contract, conduct of the Plaintiff becomes relevant for deciding discretionary relief against her. Apart from this, it is pertinent to note that Defendant No.1 has admittedly sold the suit property for the purpose of discharging loan which was obtained by her and therefore, though the time was not essence of the contract, the facts on record indicate it was necessary for Defendant No.1 to receive the entire amount as agreed in time.

15. In so far as the contention of learned Counsel for the Plaintiff about there being no direction issued by the Trial Court for refund of earnest money and the such prayer being made now is concerned, the

law on the point is settled to show that the making of the prayer to that effect in the plaint is a *sine qua non* for grant of refund of the earnest money. In this regard the latest judgment of the Hon'ble Supreme Court can be referred in case of ***K.R. Suresh Vs. R. Poornima and Ors., MANU/SC/0629/2025.***

16. In view of the said settled position law, there is no error committed by the Trial Court in not directing refund of the earnest money. Similarly, for want of any prayer, the such request cannot be considered at this stage.

17. However, it is a matter of fact that the Plaintiff has deposited the balance consideration before **this** Court and seeks withdrawal of the same. The balance amount of consideration deposited by the Plaintiff in **this** Court is not earnest money paid to the Defendant No.1. In such circumstances, when the decree of specific performance of contract has been refused, the Plaintiff would be entitled to withdraw the amount deposited in **this** Court along with interest accrued, if any.

18. In view of the above discussion, no perversity is find in the impugned judgment and decree and the concurrent findings recorded by both Courts do not deserve interference for want of perversity.

Consequently, the substantial questions of law framed by this Court as recorded above are answered in negative.

19. As a result of above discussion, the Appeal stands dismissed. However, the Plaintiff is permitted to withdraw the amount deposited in **this** Court along with interest accrued, if any.

20. Pending Civil Application, if any, stands disposed of.

(R. M. JOSHI, J.)

LATER ON

21. Learned Counsel for the Petitioner seeks continuation of interim relief for a period of three months.

22. Learned Counsel for the Respondents opposes for continuation of interim relief.

23. In view of the fact that interim relief is in force since 2006, there is no impediment to continue the same for a period of eight (08) weeks from today. Hence, it is extended for a period of eight (08) weeks from today.

(R. M. JOSHI, J.)

ssp