



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

SECOND APPEAL NO. 342 OF 2025

Janabai Prakash Udawant
and others

.. Appellants

Versus

Mohammad Yusuf Abdul Sattar

.. Respondent

Mrs. Charuta S. Deshmukh, Advocate for the Appellants.
Shri Lahrimanohar D. Vakil, Advocate for the Respondent.

CORAM : SHAILESH P. BRAHME, J.
DATE : 15TH SEPTEMBER, 2025.

FINAL ORDER :

. Heard both sides.

2. Appellants' - original defendants are questioning judgment and decree dated 07.05.2025 passed by the District Judge – 03, Ahmednagar in R.C.A. No. 462 of 2019, thereby decreeing suit of the respondent – plaintiff for specific performance of contract and reversing judgment and decree passed by the Trial Court in R.C.S. No. 548 of 2012.

3. The subject matter is a shop No. 6 admeasuring 16.72 square meters from Datta Complex, CTS No. 1221 situated at Rahuri. Late Prakash Udawant, husband of the appellant No. 1 and father of the appellant Nos. 2 to 4 had executed agreement

dated 26.04.2010 for selling the shop No. 6 to the respondent. It is a registered instrument, which is marked as Exhibit 53. The consideration was fixed at Rs 3,00,000/-. From time to time earnest amount of Rs. 2,00,000/- was parted with and possession was also handed over to the respondent. The sale deed was to be executed within two months from mutating name of the vendor in the record of rights. The respondent called upon the vendor and his brothers by issuing notice dated 04.06.2012 for execution of sale deed. No steps were taken by them, hence that was the cause for filing R.C.S. No. 548 of 2012.

4. Appellants contested the suit on various grounds. Respondent is stated to be only a tenant and fraudulently got executed agreement to sale Exhibit 53. It is further contended that suit is bad for non joinder of necessary parties, because heirs of Dattatraya, real brother of Prakash are necessary parties. It is contended that there was no transaction of agreement to sale between the parties.

5. Trial Court dismissed the suit, though plaintiff proved that agreement of sale was executed. It is recorded that appellants were not exclusive owners of the suit shop as it was joint family property of brothers and sisters of Prakash. In the absence of any consent from other co-owners and in the absence of proper enquiry on the part of the purchaser, the agreement is held to be unexecutable. Being aggrieved by the judgment of the Trial Court, respondent preferred appeal and succeeded by the

impugned judgment and decree.

6. Learned counsel Mrs. Charuta Deshmukh appearing for the appellants submits that the substantial questions of law involved in the appeal arising out of alternate findings of facts are as follows :

(i) Agreement to sale Exhibit 53 is unexecutable because suit shop is joint family property, which is candidly mentioned in the agreement, but no consent of co-owners is obtained.

(ii) The suit is bad for non joinder of necessary parties. Brothers and sisters of the deceased Prakash are necessary parties.

(iii) The respondent is the purchaser of undivided joint family property. The suit is premature and there is non compliance of conditional agreement.

(iv) Impugned decree is unexecutable in the absence of partition by metes and bounds amongst the members of the family and no relief of partition is sought for in the partition.

7. Per contra, learned counsel Mr. Vakil for the respondent submits that the entire shopping complex admeasuring 1200 square meters is joint family property comprising of 40 shops and 15 flats. Out of that suit shop is of 16.72 square meters, which was agreed to be sold by deceased Prakash. The co-owners were

called upon to comply the agreement vide notice dated 04.06.2012. No objection was taken by other co-owners. It is submitted that shop No. 6 is demarcable, separable and forms very small part of joint family property. It is contended that as per the privity of contract, agreement Exhibit 53 is enforceable. It is further submitted that unless a sale deed is executed, respondents cannot claim partition. It is further contended that conditional agreement cannot be an impediment for the relief of specific performance of contract.

8. I have considered rival submissions of the parties. A copy of agreement to sale dated 26.04.2010, Exhibit 53 is produced on record. It is registered agreement executed by deceased Prakash, husband of the appellant No. 1 in favour of the respondent. The specific description of shop No. 6 is mentioned in clause 2 of the agreement as well as para No. 1 of the plaint. It is candidly disclosed in para No. 5 of the agreement that suit shop was joint family property and there was oral partition allotting suit shop to the vendor. The sale deed was to be executed after two months from mutating name of the executor exclusively in the record of rights. Possession is stated to have been handed over to the respondent. It is further recited that suit shop is free from any incumbrance and sellable. The vendor ensures the respondent about his sellable interest.

9. Before filing suit, respondent issued a notice Exhibit 64 dated 04.06.2012, not only to the deceased Prakash, but his

brothers also. They were served and acknowledgments were produced on record which are not disputed either by appellants or those brothers. None of them ever raised objection regarding enforceability of the agreement to sale in question. The appellant No. 2 – Nitin Prakash Udawant was witness to the registered agreement Exhibit 53. There is reason to infer that he could have intimated other co-owners about the execution of the agreement. The execution of agreement is proved before the Courts below. No rival claim is set up by alleged co-owners of the suit shop.

10. Agreement to sale Exhibit 53 is registered instrument. Handing over of possession is recited in it. Respondent is in possession of the suit shop. The brothers of deceased Prakash did not object the transaction. They did not appear either before the Trial Court or lower Appellate Court setting up for rival claim. Under these circumstances, lower Appellate Court is justified in holding that there was oral partition and suit shop was allotted to the deceased Prakash. The findings cannot be said to be perverse or illegal.

11. The agreement to sale is enforceable because it was represented to the respondent that there was oral partition and the suit shop was allotted to the vendor Prakash. Further recital is incorporated that after mutating vendor's name in the record of rights sale deed was to be executed. It is permissible to grant specific performance of contract in pursuance of conditional

agreement and for that purpose a useful reference can be made to the judgment of the Apex Court in the matter of G. T. Girish Vs. Y. Subba Raju deceased by L.Rs. reported in *(2022) 2 SCC 321*. Both the parties to the contract incorporated the condition which could not be said to be an impediment for granting a specific performance of contract. The respondent is entitled to get benefit of Sec. 41 of the Transfer of Property Act.

12. The suit shop has not been transferred to the respondent. A co-owner is entitled to alienate his undivided interest to the third person. The purchaser is entitled to have specific portion after partition by metes and bounds. In the absence of partition even a purchaser is entitled to file suit for partition claiming his specific interest. In the present case, if the sale deed is executed and the suit shop along with other properties remained to be undivided, then there is possibility of claiming possession of a suit shop by filing suit for partition. However, in the present case possession of suit shop has already been given to the respondent. For that reason also agreement is enforceable and decree is executable.

13. It has been demonstrated by the respondent that there are near about 40 shops and 15 flats in Datta Complex, of which suit shop No. 6 is part and parcel. It is admeasuring 16.72 square meters out of 1200 square meters. There are seven brothers to share Datta Complex. It was represented to the respondent that there was oral partition and suit shop was allotted to the share of Prakash. There was nothing illegal or unreasonable in it. No

prejudice would be caused to other co-owners if decree of specific performance of contract is passed in respect of suit shop.

14. The brothers of vendor Prakash did not object the transaction. They were aware of agreement as well as suit. It's a tacit consent for selling of shop. They cannot be said to be necessary party to suit. I find that lower Appellate Court has rightly appreciated material on record and justified in reversing the decree passed by the Trial Court. No substantial question of law appears to be involved in the second appeal.

15. Learned counsel for the respondent seeks to rely on the judgment of the Supreme Court in the matter of Kartar Singh Vs. Harjinder Singh and others reported in (1990) 3 SCC 517. In that case the vendor had entered into agreement, agreeing to sell his share as well as his sister's share. The basic facts are distinguishable from the facts of the present case. In the case at hand what is agreed to be sold is the share allotted in oral partition. This judgment will not help the respondent. Further reliance is placed on the judgment of the Coordinate Bench in the matter of Gopal Ramvilas Gattani Vs. Sheshrao Pundlik Hivarkar by L.Rs. reported in 2008(6) Mh. L. J. 231. This judgment is also distinguishable on facts. By way of agreement the vendor was found to be not owner of entire suit land, but to the extent of 3/4th share and ultimately it is held that plaintiff is entitled to specific performance of contract to the extent of 3/4th share. The facts are distinguishable from our case. This judgment would be of no avail to the respondent.

16. Reliance is also placed on the judgment of the Apex Court by the respondent in the matter of A. Abdul Rashid Khan (Dead) and others Vs. P.A.K.A. Shahul Hamid and others reported in *(2000) 10 SCC 636*. It is useful to refer to relevant para No. 15 of the judgment.

“15. So far as the other part of the High Court’s order by which it decreed the alternative relief of Respondent 1 for partition of the suit property in six equal shares by metes and bounds and delivering separate possession over these such shares is concerned, on the face of it it is erroneous and cannot be sustained, in a suit for specific performance. The vendee on the date of filing this suit has not yet become the owner of this property, as he merely seeks right in the said property through the decree of specific performance. When the sale deed itself has yet to be executed, his right in the property has not yet matured, how can he claim partition and possession over it? Even after decree is passed, his right will only mature when he deposits the balance consideration and the sale deed is actually executed. This apart, how could there be any partition in the property, without the other co-sharers joining, who are not part of the disputed agreement? No issue is framed between them. No evidence led. Hence, we find that the High Court was not right in decreeing this alternative prayer of partition in this suit.”

17. I find substance in the submissions of the learned counsel for the respondent relying upon the ratio. The case at hand stands on better footing because I have observed that there was oral partition and the suit shop was allotted to vendor. His brothers and sisters did not object this position, meaning thereby there was implied consent.

18. For the reasons stated above, I find no substantial question of law is involved in the second appeal. Second appeal is dismissed.

[SHAILESH P. BRAHME J.]