



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

SECOND APPEAL NO.453 OF 2005

APPELLANT
(Ori. Deff)

:- Purushottam s/o. Daulat Yeole, age
Major, Occu_ Agriculturist, R/o Kapsi
Talav, Tq. And District Akola.

..VERSUS..

RESPONDENT
(Ori. Plaff.)

:- 1 Maroti s/o Totaram Billewar (Dead)
Lrs, aged about 44 years, Occu-
AgriculturistR/o Kapsi Tq. And
District-Akola,
Legal heirs of respondent.

Amendment as per courts
order dated 6/6/23

A) Durgabai Wd/o Maroti Billewar aged
about 57 years, Occ : Housewife

Amendment carried out as
per Court order dated
18/11/25

1(b) Sau Geeta w/o Shaligram Indore R/o
Darwha Naka Roopnagar, Amrai, Tah.
And Dist. Yavatmal.

C) Kailash S/o Maroti Billewar aged
about 38 years, Occ : Agriculturist

D) Vishwas S/o Maroti Billewar Aged
about 34 years, Occ : Agriculturist

E) Gopal S/o Maroti Billewar Aged
about 32 years, Occ : Agriculturist
All R/o Kapsi, Tq. & Dist. Akola

Mr. J.B. Kasat, Advocate for appellant.

Mr. S.A. Mohta, Advocate for the Respondent Nos.1A to 1E.

CORAM : **ROHIT W. JOSHI, J.**

DATE : **11.12.2025**

ORAL JUDGMENT :

1) Heard finally with consent of learned Advocate for the respective parties.

2) The present second appeal is admitted vide order dated 08.01.2008 on the following substantial question of law:-

“Whether it could be said that the plaintiff was all the while ready and willing to purchase the entire field of Gat No.208 of Mouja Kapsi admeasuring 1H.83R, throughout from the date of agreement till filing of the suit, if not, what is the effect?”

3) The appeal arises out of a suit for specific performance of contract. The agreement between the parties is dated 06.01.1997. The agreed date for execution of sale deed was 30.01.1997. The agreed sale consideration is Rs.1,37,000/-. The agreement mentions the description of the suit property as an agricultural land admeasuring 1.83 H.R.

4) Before filing the suit, the plaintiff issued a legal notice to the defendant, *inter alia* stating that upon measurement of the suit property by a private measurer, it

was found that the total extent of the suit property available at the spot was only 2 acres 30 gunthas, as against 1.83 H.R., (i.e. 4 acres 23 gunthas) recorded in the 7/12 extract. The plaintiff therefore, called upon the defendant to execute sale deed with respect to the suit property in his favour for area admeasuring 2 acres and 30 gunthas by accepting proportionate sale consideration. The defendant replied to the said notice stating that he was willing to honour the agreement subject to payment of the entire sale consideration as is reflected in the agreement. In this backdrop, a dispute arose between the parties as a consequence of which, the plaintiff filed suit for specific performance of contract.

5) The learned Trial Court has observed that the dispute between the parties was pertaining to the area of the suit property. It is observed that according to the plaintiff, only 1.01 H.R., land was available at the spot. According to the plaintiff 0.82 H.R., land had gone into the stream and was not available for sale. The learned Trial Court found that the plaintiff should have got the land measured before entering into agreement of sale. It is recorded by the learned

Trial Court that the parties did not agree that the land would be measured before execution and registration of the sale deed. The learned Trial Court has referred to admission of the plaintiff that defendant had requested him to purchase the suit property in terms of the agreement. Thereafter, finding is recorded by the learned Trial Court that the plaintiff was not willing to purchase portion exceeding 1.01 H.R.

6) In view of the above, the learned Trial Court refused to grant decree for specific performance of contract and instead granted decree for refund of part consideration of Rs.20,000/- paid by the plaintiff to the defendant in terms of the agreement.

7) Aggrieved by the said decree passed by the learned Trial Court, whereby decree for specific performance was refused, the plaintiff filed first appeal, being Regular Civil Appeal No.46 of 2000. During the pendency of the said appeal, the plaint came to be amended by filing an application for amendment of plaint dated 23.11.2004 vide Exh.22, which came to be allowed vide order dated 10.12.2004. By the said amendment, the plaintiff

incorporated pleadings that he was ready and willing to purchase the land available at the spot for the entire sale consideration as agreed under the agreement. The learned First Appellate Court has allowed the appeal filed by the plaintiff vide judgment and decree dated 15.02.2005. The learned First Appellate Court by placing reliance on evidence of private surveyor (PW.2) has recorded a finding that the area of suit property available at the spot was only 2 acres and 30 gunthas. Having regard to the case as setup by the plaintiff by amending the plaint in the first appeal, it is held that the plaintiff was ready and willing to perform his part of the contract. Accordingly, decree for specific performance of contract came to be passed in favour of the plaintiff.

8) Mr. Chopde, learned Advocate for the defendant, contends that the plaintiff was never ready and willing to perform his part of the contract. He draws attention to the legal notice issued by the plaintiff and also unamended portion of the plaint to demonstrate that the plaintiff all the while insisted for purchasing the suit property to the extent of 2 acres and 30 gunthas only by making payment of

proportionate sale consideration. By referring to the agreement he contends that the parties never contemplated that the suit property was to be measured in order to determine the sale consideration based on the actual area.

9) He also contends that the sale consideration was not fixed on per acre basis, but it was a lump sum consideration for the entire suit field. As regards Section 12 of the Specific Relief Act, he contends that although the plaintiff may give up right to enforce compliance of the entire agreement at any stage of the proceedings, he cannot be permitted to do so, once the relief for specific performance is refused by the learned Trial Court. He also contends that the plaintiff did not examine the person who had allegedly carried out measurement of the suit property initially. He points out that P.W. 2 is not the person who had carried out the measurement initially. P.W. 2 had allegedly carried out the measurement on 15.11.1999. He further contends that it is not even the case of the plaintiff that the said measurement was carried out with notice or knowledge or in the presence of the defendant. The contention is that the plaintiff failed to prove that entire

area as recorded in revenue record was not available at the spot.

10) Per contra, Mr. Mohta, the learned Advocate for the plaintiff states that the plaintiff was all the while ready and willing to perform his part of the contract. He states that the sale consideration was fixed having regard to the total area of the suit property as recorded in the revenue record and when it was found that the area was drastically short, it was natural for the plaintiff to insist for appropriate reduction in the sale consideration. He further contends that the plaintiff has established the actual area of the suit property by examining the surveyor who had carried out the measurement of the suit property. He contends that option to accept partial performance of contract can be exercised at any stage and that since appeal is also in continuation of the suit, the option to accept partial performance at the appellate stage was legally permissible.

11) Mr. Mohta, makes a submission that it is well settled that boundaries prevail over measurements and that the boundaries of the suit property were never in dispute. He

draws attention to the statement of plaintiff in examination-in-chief that the plaintiff was ready and willing to purchase the entire land within the four boundaries of the property as mentioned in the agreement.

12) It is well settled that when a bargain between the parties is recorded in writing, the document is the best evidence for understanding the terms and conditions of the bargain. In the present case, perusal of the agreement will indicate that the parties have not fixed the rate of the property on per acre basis. The agreement also does not contemplate measurement of land prior to execution of sale deed. A short period of around three weeks is stipulated for execution of sale deed from the date of execution of agreement.

13) The foundation of the finding of the learned First Appellate Court that the plaintiff was ready and willing to perform his part of the contract is that although the area of land at the spot was only 2 acres and 30 gunthas, plaintiff was ready and willing to purchase the suit property for the entire agreed consideration. In this regard, the learned First

Appellate Court did not appreciate the fact that the initial insistence of the plaintiff was to purchase the property by rateable reduction in the agreed sale consideration based on the alleged reduction of area of the land.

14) As regards the area of the land available at the spot, the learned First Appellate Court has placed reliance on evidence of the Private Surveyor (PW.2). It is not in dispute that this measurement was carried out without notice to the defendant and it is not even the case of plaintiff that the measurement was carried out in presence of the defendant or after service of notice of measurement. It is well settled that measurement carried out in absence of the person against whom it is to be proved is of no consequence and cannot be relied upon. The measurement is by a private surveyor who is not examined. The surveyor who is examined did not measure the suit property initially when dispute arose between the parties.

15) As regards the pleading with respect to Section 12, the same is incorporated in the year 2004, when the First Appeal was at the stage of final hearing. The said statement

in the plaint is made after a period of around 7 years and 10 months from the date of execution of the agreement and that too after the learned Trial Court had exercised discretion not to grant specific performance of contract.

16) It is apparent from reading of the legal notice issued by the plaintiff, initial pleadings in the plaint and also examination-in-chief of the plaintiff that he was not ready to purchase the suit property for the agreed sale consideration. The plaintiff has failed to prove that the area of suit property was less than the area recorded in the revenue record. The contention that the plaintiff was ready to purchase the property within the four boundaries also goes against the case of the plaintiff. If the entire sale consideration for the land within the four boundaries as specified in the agreement was Rs.1,35,000/-, there was no reason for the plaintiff to claim deduction in the sale consideration on the ground that the actual area is less. This circumstance also goes to show that the plaintiff wanted to purchase entire land within the four boundaries for a consideration which is far less than the consideration mentioned in the agreement

17) In that view of the matter, in the considered opinion of this Court, the plaintiff has failed to prove that he was all throughout ready and willing to perform his part of the contract. Discretionary relief for specific performance is granted by the learned First Appellate Court by ignoring the material aspects in relation to the agreed terms and conditions and conduct of the plaintiff which exhibits that he was not willing to perform his part of the contract. The substantial question of law framed in the appeal, therefore, deserves to be answered in favour of the appellant/defendant and against the plaintiff/respondent.

18) The substantial question of law is therefore answered in favour of the appellant/defendant and against respondent/plaintiff.

19) In view of the above, the second appeal is allowed in the following terms:-

(i) Judgment and decree dated 15.02.2005 passed by the learned Additional District Judge, Akola in Regular Civil Appeal No.46 of 2000 is quashed and set aside and judgment and decree dated 07.12.1999 passed by the

learned Joint Civil Judge, Senior Division, Akola in Spl. Civil Suit No.171 of 1997 is maintained with modification that the amount of part sale consideration of Rs.20,000/- paid by the plaintiff to the defendant will be refunded by the defendant with interest @ 6% per annum from 06.01.1997, i.e. the date of payment, till the date of realization of the said amount.

(ROHIT W. JOSHI, J.)

Tanmay..