



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

SECOND APPEAL NO. 519 OF 2011.

1.Sudhakar s/o Sakharampanth Mahajan,
Aged about 62 years, Occupation
Business, resident of Tulsibagh
Road, Nagpur.

2.Prakash s/o Govindrao Parlikar,
Aged about 48 years, Occupation
Business, resident of Karanja Lax,
Tahsil Karanja, District Washim.

3.Madan s/o Jairam Sakharkar,
Aged about 46 years, Occupation
Business, resident of Punam Apartment,
Nehru Nagar, Nagpur, Tahsil
and District Nagpur.

APPELLANTS.
Ori. Plaintiffs.

VERSUS

Gopal s/o Gangadhar Ghatole,
Aged about 33 years, Occupation
Business, resident of Babul Ban,
Nagpur.

RESPONDENT.
Ori. Defendant.

Shri R.L. Khapre, Senior Advocate with Shri P.A. Deshpande,
Advocate for the Appellants.
Shri A.S. Mardikar, Senior Advocate with Shri B.M. Kharkate,
Advocate for the Respondent.

CORAM : ROHIT W. JOSHI, J.

DATE : APRIL 28, 2025.

ORAL JUDGMENT :

The present appeal is admitted vide order dated 26.09.2012 on the following substantial question of law.

“Whether the Courts below were right in refusing to grant specific performance of contract only on the ground that certain portion of the land in question was under acquisition, particularly when the appellants/plaintiffs are prepared to get the specific performance at their own risk ?”

2. The appellants are Original Plaintiffs, whereas the respondent is the Original Defendant. The parties will be referred to in the body of judgment as ‘plaintiffs’ and ‘defendant’. The plaintiffs have filed a suit for specific performance of contract against the defendant being Special Civil Suit No.153/2004. It is the case of the plaintiffs that they have entered into an agreement of sale with respect to a suit property with the defendant on 02.11.2002 for a valuable

consideration of Rs.1,60,000/-, out of which a sum of Rs.1,30,000/- was paid by the plaintiffs to the defendant till the date of execution of agreement. The suit property is a land bearing Survey No.46/3 of village Panangaon, Tahsil Kamptee, District Nagpur ad-measuring 1.60 HR. The sale-deed was to be executed on 17.02.2004. However, as per the case of the plaintiffs, the defendants did not appear before the Sub Registrar for execution of the sale-deed, and they realized that he was trying to sell the suit property to some third person. In such circumstances, the plaintiffs filed a suit for specific performance of contract on 06.03.2004.

3. The defendant appeared in the matter and filed his written statement inter-alia contending that the agreement was executed as a security document for loan obtained by the defendant from the plaintiffs. Apart from this, it was stated that a portion ad-measuring around 0.57 HR out of the suit property was acquired under the provisions of Land Acquisition Act, and therefore, the agreement had become unenforceable since the entire land could not be sold. Based on the rival pleadings, the learned trial Court framed issues and proceeded to record evidence in the matter. After

recording the evidence, arguments were heard and the suit came to be decided vide judgment and decree dated 19.12.2007. The learned trial Court has held that plaintiffs had proved execution of the agreement and also payment of Rs.1,30,000/- to the defendant out of the total agreed sale consideration of Rs.1,60,000/-. Finding with respect to readiness and willingness is also recorded in favour of the plaintiffs. However, the learned trial Court has held that as per notice under Section 9 of the Land Acquisition Act, portion ad-measuring 0.5661 HR (5661 sq.mtrs) out of total 1.60 HR land was acquired by the government, and therefore, it was not possible to grant decree for specific performance in favour of the plaintiffs. It is held that neither of the party had filed any document demonstrating exact extent of area that was acquired from the suit property, and therefore, it was difficult to pass a decree for specific performance of contract. In that view of the matter, the learned Trial Court passed a decree for refund of amount of Rs.1,30,000/- along with interest @ 10% p.a.

4. Plaintiffs being dissatisfied with the decree passed by the learned trial Court filed First Appeal being Regular Civil Appeal No.59/2008. During pendency of the said appeal, the plaintiffs have

filed a pursis vide Exh.24 expressing readiness to obtain decree for specific performance with respect to the portion of the suit property that was available after acquisition. It is stated that in the said pursis that the plaintiffs will not claim any reduction in the total amount of consideration or even damages. This statement in the pursis is made without prejudice to the contention of the plaintiffs that as a matter of fact there was no reduction in the total area of land comprising of suit property.

5. After hearing the parties on merits, the learned First Appellate Court also recorded findings with respect to execution of agreement, payment of sale consideration and readiness and willingness in favour of the plaintiffs. The learned First Appellate Court rejected the contention of the defendant that the agreement of sale was a camouflage for loan transaction between the parties. However, the learned First Appellate Court declined to grant decree for specific performance in view of uncertainty with respect to portion of land that remained after acquisition of some portion. The appeal thus came to be dismissed vide judgment and decree dated 21.09.2011. It is in this backdrop that the present Second Appeal is

filed which is admitted on the substantial question of law mentioned above.

6. The defendant has also filed a cross objection in the present appeal vide Cross Objection No.69/2019. However, substantial question of law is not framed in the said cross objection and the same is also not admitted.

7. Shri R.L.Khapre, learned Senior Counsel appearing on behalf of the appellants/plaintiffs contends that the learned Courts have failed to consider the prayer clause in the plaint, as also the mandate of Section 12 of the Specific Relief Act, and have accordingly committed a manifest error in refusing decree for specific performance of contract. Referring to the agreement and prayer clause in the plaint, learned Senior Counsel points out that even at the stage of agreement parties had contemplated measurement of the suit land prior to execution of the sale deed. He draws attention of this Court to the prayer clause in the plaint in which a specific prayer is made for measurement of the suit property. His contention is that all throughout the plaintiffs were ready and willing to take as much land in the suit property as was available. He then refers to Section 12 of

the Specific Relief Act and raises a contention that even in cases where entire agreement cannot be specifically performed, decree for specific performance can be passed with respect of part of the suit property. Learned Senior Counsel argued that both the learned Courts have erred in not properly appreciating the mandate of Section 12 of the Specific Relief Act and applying the same to the undisputed facts of the case, thereby causing serious prejudice to the plaintiffs.

8. Per contra, Shri A.S. Mardikar, learned Senior Counsel appearing for the defendant contends that the arguments with respect to Section 12 are made without any foundation in the plaint. He contends that there is no pleading or evidence to demonstrate readiness on the part of the plaintiffs to accept the sale deed with respect to part of the suit property, and therefore, the plaintiffs cannot place any reliance on Section 12 of the Specific Relief Act. He further contends that filing of pursis intimating readiness to accept performance of contract in part, will not be sufficient and that such a statement ought to have been incorporated in the plaint initially and the same should have been proved during the course of evidence. According to the learned Senior Counsel, a pursis is a mere intimation

to the Court which can never partake the character of pleading or evidence, and as such the decree for specific performance could not have been passed relying upon the said pursis.

9. As regards the cross objection, learned Senior Counsel contends that perusal of the agreement will demonstrate that payments were made by the plaintiffs to the defendant from time to time even prior to the execution of the agreement. He contends that this by itself is sufficient to establish the case of loan transaction set up by the defendant. He argues that the decree for specific performance cannot be granted having regard to the nature of transaction. His contention is that the agreement is not a genuine transaction of sale, but, only a document to camouflage loan transaction, ought to have been accepted by the Courts below.

10. Opposing the submissions on cross objection, Shri Khapre, learned Senior Counsel for the appellants contends that the trial Court had passed a decree for refund of sale consideration against the defendant, against which the defendant has not preferred any first appeal or cross objection in the first appeal preferred by the present appellants, and therefore, they are not entitled to file cross objection in

present Second Appeal.

As regards to the merits of cross objection, the learned Senior Counsel contends that the agreement of sale is executed between the parties and signature on the document is also not disputed by the defendant. He contends that the defendant has not raised the contention that the manner in which the sale consideration is paid indicates that the transaction was a loan transaction. His contention is that such an argument cannot be raised for the first time in the Second Appeal.

11. As regards the maintainability of the cross objection, I am in agreement with Shri Khapre, learned Senior Counsel, that having failed to file any substantive appeal or a cross objection in the first appeal filed by the plaintiffs, the defendants cannot file cross objection in the second appeal for the first time. Cross objection is therefore, not maintainable.

12. However, at the same time the defendant can assail adverse findings recorded against him even without filing cross objection. Filing of cross objection is mandatory in order to challenge the adverse decree. However, if adverse findings are to be challenged,

filing of cross objection is not mandatory. A party to the suit who chooses not to file a substantive appeal, may raise question on the correctness of the findings recorded against him in the appeal filed by other party without filing a cross objection. However, if a party is aggrieved by any part of the decree and wishes to assail the same, then he cannot do so without filing cross objection.

13. In that view of the matter, the contention of the defendant that the agreement was infact to cover up a loan transaction can be examined even in absence of cross objection. In order to appreciate the contention of the defendant with respect of nature of transaction, reference needs to be made to Sections 91 and 92 of the Evidence Act. Section 91 of the Evidence Act provides that when terms of contract have been reduced into writing, no evidence other than the document will be given in proof of the terms of the contract. Section 92 of the Evidence Act provides that in case of a written agreement, no evidence with respect to any other oral agreement shall be admissible for the purpose of contradiction, barring adding to or subtracting from the terms of the written agreement. However, the proviso to Section 92 stipulates that when a document is purported to

be a document regarding certain transaction, but, the real intention is otherwise, then what is recorded in the document, other than the oral evidence can be led to determine the true nature of the transaction between the parties. In that view of the matter, the evidence other than the document can be looked into to determine as to whether the party has really intended to enter into an agreement of sale to be followed by a sale deed or the document was executed only as security for loan allegedly advanced by the plaintiffs to the defendant.

14. Perusal of the evidence on record and findings recorded by both the learned Courts below indicate that the defendant has failed to establish his case of agreement being a sham document, created in order to cover a loan transaction. The Courts have appreciated rival pleadings and evidence on record on this aspect in its proper perspective and have recorded findings of fact which appears to be just and proper and do not warrant any interference at the hands of this Court in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure.

15. It also needs to be mentioned that the contention that can

be canvassed with respect to dates of payment of advance amount prior to execution of agreement was not raised before the learned Courts below. The evidence led by the defendant does not throw any light on this aspect of the matter. Likewise, the cross examination of the plaintiffs' witness is also not on these lines. The inference that is sought to be drawn on reading of the agreement is an inference of fact, therefore, proper foundation ought to have been laid before the learned trial Court to enable the other side to meet the contention. Such a contention cannot be raised for the first time in second appeal. It was necessary for the defendant to plead that the transaction was a loan transaction having regard to the dates of payment of sale consideration from time to time, even before execution of the agreement of sale.

16. In that view of the matter, the contentions of the defendant that the findings with respect to nature of transaction are liable to be rejected.

17. As regards the substantial question of law framed in this appeal, it is apparent from bare reading of the agreement that although the area of the suit property was mentioned as 1.60 HR, the parties

had agreed that the suit property would be measured so as to ascertain the exact area of the same. A perusal of the plaint will also demonstrate that the plaintiffs have specifically prayed for measurement of the suit property. The plaint indicates that the plaintiffs were ready to go ahead with the sale transaction irrespective of minor variation in the area of the suit property that may have been found on measurement of the same.

18. As regards the main controversy between the parties with respect to acquisition of the land, both the parties are at a serious contention with respect to exact area of land which is acquired from and out of the suit property. Plaintiffs contends that the entire suit property is available even today for sale. As against this, the contention of the defendant is that no portion of the suit property is available. In this regard it needs to be mentioned that the decree in a suit for specific performance till the stage of adjudication of the rights of the plaintiffs to claim specific performance is a preliminary decree. The Court does not loose cession over the matter after passing a decree of specific performance of contract. In the present appeal the controversy that falls for consideration is – whether plaintiffs are

entitled for a decree for specific performance. The Courts below have refused to pass a decree for specific performance of contract in favour of the plaintiffs. Plaintiffs are seeking a decree for specific performance in the present Second Appeal. In the event the decree for specific performance is granted, the same will be a preliminary decree and further rights of the parties will be worked out in further proceedings which culminate with execution and registration of the sale deed of the suit property. Having regard to the nature of the decree that is initially passed in a suit for specific performance of contract, there is no need to enter into the arena of controversy with respect to the portion of the suit property that would be available to the plaintiffs in view of the land acquisition.

19. As regards merits of the matter, the defendant has come up with a case that a portion ad-measuring 0.5661 HR land out of the total area of 1.60 HR of suit land is acquired under land acquisition. This is the specific case of the defendant in the written statement. In view of this statement, the learned Courts have refused to grant decree for specific performance of contract to the plaintiffs. The learned Courts have observed that there is no certainty with respect to the

exact area of the land acquired and the balance land available after acquisition.

20. In this regard reference needs to be made to Section 12 of the Specific Relief Act. Section 12[1] of the Specific Relief Act provides that normally a decree for specific performance cannot be passed with respect to part of the contract. However, Sections 12[2] and 12[3] are exceptions to Sections 12[1]. Section 12[2] provides that when a party to a contract is unable to perform whole of its part and the part which cannot be performed bears only a small proportion to the whole value of the contract, the Court may pass a decree for specific performance and award compensation in terms of money for the remaining part. Section 12[3] provides that where the party to a contract is unable to perform whole of its part and the part of contract which cannot be performed forms a considerable part, then the specific performance can be granted, if the plaintiff agrees to pay or has paid the entire agreed consideration, reduced by consideration for part which is to be left unperformed or pays entire amount and agrees to relinquish performance of the remaining part and also right to claim compensation for the balance part of contract, specific performance

with respect to part of the agreement which is capable of specific performance, can be granted.

21. In the case at hand, the plaintiffs have filed a pursis before the learned First Appellate Court agreeing to take sale deed with respect to the portion of the suit property which is available after acquisition. The plaintiffs have also stated that they shall not claim any compensation for the unperformed part of the contract. Plaintiffs have also shown their willingness to pay the entire agreed consideration without making any deduction irrespective of the area of land that may be available. This statement is made without prejudice to their contention that entire land is still available for sale.

22. The first aspect which needs to be considered is as to whether exercising option as contemplated under Section 12[3] of the Specific Relief Act is permissible at the appellate stage. In this regard reference needs to be made to the judgment of Punjab and Haryana High Court in the case of **Smt. Harnam Kaur and others .vrs. Jagtar Singh** reported in **AIR 1992 P & H 138**. The learned Punjab and Haryana High Court has held that relinquishment as contemplated

under Section 12 of the Specific Relief Act can be made at any stage of the suit or in appeal. In holding so, it has referred to the earlier decision of different High Courts on the point.

23. In the matter of **Jeet Singh @ Jeetan .vrs. Daulat Ram and others** reported in **AIR 1992 P & H 3**, the Punjab and Haryana High Court has held that the relief for part performance of the contract as against performance of entire contract can be claimed at any stage of the proceeding. The Hon'ble Supreme Court in the case of **Surinder Singh .vrs. Kapoor Singh and others** reported in **(2005) 5 SCC 142**, held that Section 12[3] does not provide any time frame for exercising the option under the said provision, and therefore, the application indicating willingness as per the said provision can be filed at any stage of the proceeding. The Hon'ble Supreme Court has referred to its earlier decision in the matter of **Kalyanpur Lime Works Ltd .vrs. State of Bihar** reported in **AIR 1954 SC 165**, where claim for part performance of the contract was given up during the course of final arguments in the suit. It needs to be mentioned that in the said matter the plaint was not amended, however, intention to forego part of the claim of specific performance was made by way of an application,

which was held to be acceptable by the Hon'ble Supreme Court. The aforesaid judgments relied by the learned Senior Counsel appearing for the appellants leave no manner of doubt that the option of accepting part performance can be exercised at any stage, including during the course of appeal.

24. It is apparent from reading of the judgment of Punjab and Haryana High Court in Harnam Kaur [supra] that plaint is not required to be necessarily amended in order to invoke Section 12[3] of the Specific Relief Act. Similar inference can be drawn from the judgment of Hon'ble Supreme Court in case of Surinder Singh [supra]. As regards pleadings, it is apparent that the motion with respect to Section 12[2] was accepted by the Hon'ble Supreme Court in view of the statement made across the bar, as also on the basis of application for amendment of plaint. It will be pertinent to mention here that the statement was made and application for amendment invoking Section 12[3] was filed before the Hon'ble Supreme Court. It will be pertinent to mention here that in the application for amendment there was no specific statement as contemplated under Section 12[3][b], however, inference that Section 13[2][ii] regarding relinquishment of claim for

performance of remaining part of the contract and right to claim compensation was drawn from the other contents of the application and most importantly that inference was drawn on the basis of statement made at the bar, which was accepted by the Hon'ble Supreme Court. The said judgment is squarely applicable to the facts of the present case. It will also be pertinent to mention here that the Hon'ble Supreme Court has quoted with approval a judgment of the Patna High Court in case of **Girdhar Das Anandji .vrs. Jivaraj Madhavji Patel** reported in **1971 Pat LJR 66**, in which relinquishment was made on an oral statement at the commencement of argument, which was accepted by the Patna High Court.

25. In the present case, before the First Appellate Court a specific pursis is filed stating that the plaintiffs are ready to accept the balance portion of land available after alleged acquisition of some portion of the suit property, and further that the plaintiffs were ready and willing to pay the entire agreed sale consideration although the actual area of the land may be less. Likewise, a positive statement is also made in the pursis giving up the claim for compensation for part of the contract, that could not be performed.

26. In that view of the matter, it can safely be concluded that option to accept specific performance of contract in part can be exercised even at Appellate stage and without amending the plaint.

27. Shri Mardikar, learned Senior Counsel is right in his submission that Pursis is an intimation to the Court. In the present case, the plaintiffs have filed a Pursis before the First Appellate Court agreeing to accept the specific performance of as much portion of the suit land as may be available after acquisition of the same under the Land Acquisition Act. The plaintiffs were also agreeable to pay the entire sale consideration as per the agreement despite the fact that the entire land may not be available for sale to them. Likewise, the plaintiffs have also agreed to give up their right to sue the defendant for compensation. Since the plaintiffs had given up their right and were satisfied with whatever portion of the suit land was available, coupled with the fact that they were ready to make payment of entire sale consideration without proportionate reduction, it was sufficient to intimate the Court that they were giving up their rights and were willing to accept the performance of part of the contract by filing a pursis. It is not the case of the defendant, that he was not aware about

the pursis filed by the plaintiffs giving up their right. When a right is unconditionally given up, filing of a pursis with intimation to other side will serve the purpose. Had the case been that the plaintiffs wanted proportionate reduction in the sale consideration or would have pressed for claim of compensation, then the things would be different. In the facts of the present case the contention that the statement of plaintiffs with respect to Section 12[3] of the Specific Relief Act should not be accepted on a pursis, is liable to be rejected.

28. The learned Senior Counsel appearing for the defendant has placed reliance on the following judgments :

- (i) **Shanker Singh .vrs. Narinder Singh and another**
[2014] 16 SCC 662.
- (ii) **Jaswinder Kaur .vrs. Gurmeet Singh and others**
[2017] 12 SCC 810
- (iii) **J.Devadasan .vrs. M. Harikrishnan**
Madras High Court in Second Appeal No.75/2011 dated
27.06.2013.
- (iv) **Nallam Seeta Mahalakshmi and others vrs. Talari**
Vijayalakshmi
2005 [6] ALT 65.

Perusal of paragraph no.32 of the judgment of Hon'ble

Supreme Court in case of Shanker Singh [supra], relied upon by the learned Senior Counsel, indicates that the Hon'ble Supreme Court has held that since the agreement was not capable of being performed, question of invoking Section 12 of the Specific Relief Act did not arise. In said case, the defendant has entered into an agreement of sale with the plaintiff, however, half of the suit property was owned by his brother, and other half was owned by his wife. Neither brother, nor wife were parties to the agreement. In such circumstances although the plaintiff was willing to pay the entire sale consideration for half share of the suit property owned by wife of the defendant, the Hon'ble Supreme Court has held that since the defendant was not owner, the agreement was not enforceable and Section 12[3] could not be invoked.

29. The learned Senior Counsel has placed reliance on paragraph nos. 20 and 21 of the judgment of Hon'ble Supreme Court in case of Jaswinder Kaur [supra]. The said judgment is of no help to the defendant, since in the said matter the plaintiff was at fault and the agreement could not be performed for the reasons attributable to him. In such circumstances, it is held that the plaintiff was not entitled to

specific performance of part by placing reliance on Section 12[3] of the Specific Relief Act. In the present matter both Courts have concurrently held that the plaintiffs were ready and willing to perform their part of the contract.

30. Reliance is also placed on the judgment of Madras High Court in case of J. Devadasan [supra], specifically paragraph no.51. The Madras High Court while entertaining a second appeal expressed that the plaintiff was entitled the benefit of the said provision in order to seek specific performance of contract in part. However, the High Court deemed it appropriate to remand the matter to the learned First Appellate Court with permission to the plaintiff to amend the plaint so that his statement with respect to Section 12[3] of the Specific Relief Act could be made in writing. The High Court issued directions to the learned First Appellate Court to complete the formality by granting a decree of specific performance with respect to 2/3rd share in the suit property on amendment of plaint by the plaintiff, giving up 1/3rd share therein. The said judgment is not an authority for the proposition that option under Section 12[3] cannot be invoked at the appellate stage or that pleading with respect to Section 12[3] must be

incorporated in the plaint. Infact paragraph no.51 on which reliance is placed by the defendants starts with the words “*In my opinion, before this court itself the said exercise can be undertaken....*” Having observed so, the High Court in its discretion deemed it appropriate to direct the First Appellate Court to complete the formalities with respect of passing the decree for specific performance of contract invoking Section 12[3]. This judgment infact supports the case of the appellants/plaintiffs.

31. The learned Senior Counsel has also placed reliance on the judgment in case of Nillam Seeta Mahalakshmi [supra] to contend that the plaint has to be amended in order to seek alternate relief of performance in part as per Section 12[3]. The said case is also distinguishable on facts. Perusal of paragraph no.39 of said judgment would indicate that although the plaintiff was aware about share of the parties in the suit property, she did not relinquish claim with respect to part of the property which her vendor i.e. defendant nos. 1 to 3 were not capable of performing. She had also not relinquished the claim for compensation. It is in this context it is held that it was necessary for the plaintiff to come up with such a case giving up right to seek

performance of part of the contract, which is not capable of being performed and relinquish the right to claim compensation. Further it is also held that when share is undefined, the consideration for the portion of property which is not covered by the agreement cannot be quantified. In this factual backdrop, the High Court has held that necessary averments in the pleading with respect to Section 12[3], were necessary. The said case is clearly distinguishable on facts. In the present case, the plaintiff has made a categorical statement giving up right to claim compensation for portion of the suit property which may not be transferred in his favour and more importantly he has made a categorical statement agreeing to make payment of entire sale consideration for any part of the portion of the suit property that may be available after the alleged acquisition. In that view of the matter, the contention of defendant that the plaint was required to be amended in order to take shelter of Section 12[3] of the Specific Relief Act is liable to be rejected, and is accordingly rejected.

32. In the result for the reasons recorded above, the substantial question of law is answered in favour of the appellants/plaintiffs. Consequently, the appeal is accordingly allowed

in following terms.

- (i) The decree of refund of part payment passed by the learned Trial Court in Special Civil Suit no.153/2004 on 19.12.2007 is set aside and the same is substituted by a decree of specific performance of contract in favour of the plaintiff with respect to the suit property/ any portion of the suit property, that is available for sale after the alleged acquisition.
- (ii) The learned Executing Court shall determine the portion of the suit property that is available after alleged acquisition by giving opportunity of leading evidence and hearing to both sides.
- (iii) The plaintiff will be bound by the pursis filed before the Appellate Court in Regular Civil Appeal No.59/2008.
- (iv) Costs to follow the cause.

JUDGE