

CNR No. :- MHNS02-001834-2015.



Received on : 18/08/2015.

Registered on : 18/08/2015.

Decided on : 07/12/2023.

Duration : Y. M. D.
08 03 19.

IN THE COURT OF 3rd JT. CIVIL JUDGE SENIOR DIVISION,

AT :- NASHIK, TAL & DIST. NASHIK.

(Presided over by :- Smt. Deepali Parimal Kaduskar)

Spl. Civil Suit No. 376/2015.

Exh. :- 41.

Jagendrakumar Hansraj Gupta,

Age :- 60 Years, Occupation :- Business,

R/o. Flat No. 8, Gitadarshan Co-operative

Housing Society Ltd., Gaikhe Colony,

Nashikroad, Tal. and District Nashik.

Plaintiff.

Versus

1. Ujwala Sanjay Pagare,

Age :- 40 Years, Occupation :- Household,

2. Pooja Sanjay Pagare,

Age :- 22 Years, Occupation :- Education,

3. Ronak Sanjay Pagare,

Age :- 19 Years, Occupation :- Education,

All R/o. Flat No. 24, Harikunj Co-operative

Housing Society Ltd., Aagartakli, Nashik, Tal.

and District Nashik.

Defendants.

Suit for specific performance of contract and permanent injunction.

Learned Advocate for Plaintiff :- Shri. V. T. Chougule.

Learned Advocate for Defendants :- Shri. S. B. Kachole.

J U D G M E N T
(Delivered on 07th December 2023)

Plaintiff's case in nutshell is as under :-

Property bearing Survey No. 23/16/1+16/2A+17/1+17/2A+17/2B-2B/1/2+18/2/2/2A-1/5/2 out of which non-agricultural area ad-measuring 1600.00 square meters Harikunj Co-operative Housing Society Ltd., Flat No. 24 area ad-measuring 502.64 square foot, built-up area 46.71 square meters on second floor of Building No. 2 situated at Aagartakli, Tal. and District Nashik. The four boundaries of the property are as follows -

Towards east - : Building No. 3.

Towards west - : Building No. 1.

Towards south - : Side Marginal Space.

Towards north - : Flat No. 21.

(The above mentioned property i.e. flat No. 24 is hereinafter referred as 'suit property' for short).

2. According to plaintiff, the suit property was owned by Malini Wamanrao Kedare the earlier member of Harikunj Co-operative Housing Society Ltd., Nashik. She had sold out the suit property to husband of defendant No. 1 and father of defendant No. 2 and 3 namely late Sanjay Bapurao Pagare by agreement to sale dated 06th August 1999. The said agreement to sale is registered with Sub-Registrar, Nashik - 2 bearing document registration No. 6277/1999 on 09th August 1999. The entire sale

consideration was paid to late Sanjay Pagare. However, on 09th June 2007 Shri. Sanjay Pagare died and defendant No. 1 to 3 are his only legal heirs. Membership of the suit property was transferred in the name of defendants and their names are mutated as owner and possessors with Municipal Corporation, Nashik, the Housing Society as well as State Electricity Board. After that Malini Wamanrao Kedare transferred the suit property in favour of defendants by registered document bearing No. 1756/2015 dated 05th March 2015. Accordingly, name of defendants are mutated as owner and possessor of the suit property.

3. In February 2015 defendants were in financial need therefore, they intended to sale the suit property. Plaintiff came to know about the said fact and since he is knowing defendants and he was intending to purchase the suit property for residential purpose at Aagartakli area therefore, there was discussion between plaintiff and defendants about the sale-purchase transaction of the suit property. Accordingly, defendants agreed to sale the suit property to plaintiff for consideration of Rs. 7,92,000/-. Defendants executed an agreement to sale of suit property in plaintiff's name on 12th February 2015 by registered agreement to sale bearing No. 1784/2015 dated 05th March 2015 on conditions. As per the condition it was decided between the parties that, the sale consideration will be Rs. 7,92,000/- and accordingly, plaintiff has paid Rs. 7,00,000/- to defendants on the day of execution of agreement to sale and remaining amount of Rs. 92,000/- will be paid on the document of

transfer or after sanction of loan case from bank. However, in-spite-of the fact that plaintiff was and is ready to pay the balance consideration amount, defendants tried to avoid execution of the sale deed. It was agreed between the parties that on non execution of the sale document plaintiff will be entitled to get the sale deed executed from Court. On 09th July 2015 plaintiff has sent legal notice to defendants which is received by them on 10th July 2015. In-spite-of receipt of notice defendants failed to execute the sale deed.

4. According to plaintiff, he personally met defendants and asked about the execution of sale deed at that time defendants abused and threatened to plaintiff and denied to execute the sale deed. Defendants have threatened to sale out suit property to third person. Accordingly, plaintiff constrained to file present suit. Cause of action to file present suit arose on 12th February 2015 when the agreement was executed after that when plaintiff sent notice to defendants on 09th July 2015 and after that day to day.

5. In consequence of summons defendants have appeared and filed their written-statement vide Exh. 15. They have denied all the material contentions raised by plaintiff. According to defendants, on 02nd April 2015 the marriage of defendant No. 2 was fixed. However, husband of defendant No. 1 and father of defendant No. 2 and 3 died in the year 2007 leaving behind him no amount to perform the marriage. The suit property was not legally in his name. At that time person namely Rahul Donde who was

acquainted with defendant No. 3 came to defendants and told that plaintiff will pay money on interest. Defendants informed plaintiff that the suit property is not yet registered in their name at that time plaintiff who is a professional builder informed defendants that he will transfer the suit property in defendants' name and for that they have to bare the expenses. Accordingly, suit property was registered in defendants' name. Since plaintiff got acquainted with defendants he agreed to give the amount to defendants for marriage ceremony. Plaintiff informed to defendants that, he does not possess money lending license and the private money lending business is an offence therefore, he asked defendants to execute the mortgage deed of suit property. Defendants are illiterate persons and plaintiff has taken disadvantage of this fact and got executed the document of agreement to sale from defendants. However, the said document was never intended to be acted upon.

6. It is further their contentions that, defendants have accepted cheque of Rs. 2,15,000/- dated 12th February 2015 and en-cashed the said cheque in bank in presence of mediator Rahul Donde and the said amount was received by plaintiff from defendants towards interest and principal amount. In this way, defendants have paid Rs. 2,15,000/- to plaintiff on the same day. The mediator Rahul Donde has withdrawn Rs. 1,75,000/- on 13th February 2015 from the said cheque amount and the entire transaction was done before defendants and one of his relatives namely Rangnath Yashwante. In this way, plaintiff has deceived defendants by showing the consideration amount in the

agreement but the said amount was never received by defendants. The agreement to sale is a nominal document and defendants have not received the entire amount. Therefore, the present suit is not maintainable and liable to be dismissed.

7. From the rival contentions of parties my learned predecessor framed issues vide Exh. 15 to which I have recorded my findings thereon for the reasons stated below :-

<u>Sr. No.</u>	<u>Issues</u>	<u>Findings</u>
1.	Does plaintiff prove that defendant agreed to sell suit property to him for total consideration of Rs. 7,92,000/- vide agreement dated 12-07-2015 ?	... <u>In affirmative.</u>
2.	Does plaintiff prove that he has paid advance consideration of Rs. 92,000/- to defendants ?	... <u>Plaintiff has paid consideration of Rs. 7,00,000/-.</u>
3.	Does plaintiff prove that he has always been ready and willing to perform his part of contract ?	... <u>In affirmative.</u>
4.	Whether plaintiff is entitle for the specific performance of contract as sought ?	... <u>In affirmative.</u>
5.	Does plaintiff prove that defendants are illegally trying to create third party interest ?	... <u>In negative.</u>

6. Whether plaintiff is entitle for perpetual injunction as sought ? ... **In affirmative.**
7. Whether plaintiff is entitle to get decree of specific performance of contract as prayed ? ... **In affirmative.**
8. Do defendants prove that plaintiff has got executed the agreement dated 02-04-2015 by playing fraud upon them ? ... **In negative.**
9. What order and decree ? ... **Suit is decreed with cost.**

Evidence of plaintiff produced on record :-

8. In order to prove his claim plaintiff have examined in all two witnesses. Plaintiff Jagendrakumar Hansraj Gupta as P. W. No. 1 at Exh. 16. Plaintiff placed his reliance on documentary evidence i.e. notice dated 06th July 2015, postal receipts, original copy of flat transfer deed, original copy of agreement to sale and no objection certificates. Plaintiff has filed written argument at Exh. 40. Learned counsel of plaintiff placed his reliance on :-

1. **Hariba Babu Babar and another Vs. Appasaheb Dadu Nagargoje, reported in 2007 (5) Mh.L.J. 261**
2. **Kishor s/o Gopaldas Gupta Vs. Ambadas s/o Gangaprasad Bhagat, reported in 2014 (2) Mh.L.J. 817**
3. **Chintaman Sitaram Bajad (D) through L.Rs. Vs. Shankar Sonaji Shingne, reported in 2014 (3) Mh.L.J. 33**

9. In support of their claim defendants have examined two witnesses. Defendant No. 1 Ujwala Sanjay Pagare as D. W. No. 1 at Exh. 22

and Rahul Donde as D. W. No. 2 at Exh. 30. Evidence of defendants is closed vide order below Exh. 1 on 27th February 2023.

REASONS

Evidence, appreciation and discussion with regard to issue

No. 1 -

10. Before starting discussion on this issue I would like to mention here that, the date of agreement is 12.02.2015 and not 12.07.2015. This fact is clear from the plaint as well as written-statement. Therefore, in the light of the pleadings of the parties I proceed to decide this issue considering the date of agreement as 12.02.2015.

11. Plaintiff in his evidence repeated all the material contentions of plaint. Hence, for the sake brevity it is not reproduced here at length. It is evidence of plaintiff that, an agreement to sale dated 06th August 1999 was executed in the name of husband of defendant No. 1 and father of defendant No. 2 and 3 by earlier member Malilini Wamanrao Kedare of Harikunj Co-operative Housing Society. The said document is registered before the Sub-Registrar, Nashik - 2 bearing document No. 6277/1999 on 09th August 1999. The entire consideration was received by late Sanjay Bapurao Pagare. After the demise of Sanjay Pagare defendants being his legal heirs got the membership of Harikunj Co-operative Housing Society at the place of Sanjay Pagare. The earlier member Malini Wamanrao Kedare executed the document

dated 05th March 2015 bearing No. 1756/2015 and thereby transferred the suit property in favour of defendants. Defendants became the legal owner and possessor of suit property.

12. He further stated that, in the year 2015, defendants were in financial need and they were intended to sale suit property. After coming to know about the sale of the suit property and since, plaintiff was intending to purchase the flat at Aagartakli area therefore, there was a pre-sale talk between plaintiff and defendants. The consideration was decided for Rs. 7,92,000/-. Defendants agreed to sale suit property to plaintiff and accordingly, on 05th March 2015 document of sale deed bearing No. 1756/2015 was handed over to plaintiff. After the discussion of the said transaction on 12th February 2015 agreement of suit property got executed in favour of plaintiff. The said agreement is registered before Sub-Registrar, Nashik - 2 on 05th March 2015 bearing document No. 1784/2015.

13. Plaintiff has brought on record the said sale deed / transfer deed dated 12th February 2015 on record. Perusal of the same it reveals that, the said transfer deed is executed by Malini Kedare in favour of defendant No. 1 to 3 with regard to suit property. From the perusal of the said document it reveals that, by the said transfer deed defendants got the ownership and possession of the suit property. Plaintiff has brought on record registered agreement to sale dated 12th February 2015 executed in favour of plaintiff by

defendants. Perusal of the same it reveals that, the consideration amount was decided to the tune of Rs. 7,92,000/-. Out of the said consideration amount plaintiff has paid Rs. 7,00,000/-. In this regard, the cross-examination of defendant no.1 Ujwala Pagare is very much relevant. It is pertinent to state here that, though defendants have denied execution of agreement to sale in favour of plaintiff, however, in cross-examination defendant No. 1 Ujwala Pagare admitted that the period of agreement to sale was six months. She further admitted that, after six months on 09th July 2015 plaintiff sent notice to them for execution of sale deed by accepting balance consideration amount. She further admitted that, they have not replied the said notice.

14. It is pertinent to state here that, defendant No. 1 categorically admitted in her cross-examination that, the transaction of suit property was fixed on 12th February 2015 and on 05th March 2015 agreement to sale was executed. From this very fact and the document brought on record by plaintiff established the fact that there was an agreement to sale between plaintiff and defendants and the said is a registered document. It is pertinent to state here that, plaintiff has brought on record original transfer deed, however, the said documents are not exhibited. However, the said document is referred by plaintiff in his evidence and the same is admitted by defendant No. 1 in her cross-examination. Therefore, even though the said document is not marked as an exhibit however, it is settled law that exhibiting document is an administrative act. Furthermore, the documents are registered documents.

Moreover, defendant No. 1 admitted in her cross-examination about the execution of the said document. As per section 58 of Indian Evidence Act facts admitted need not be proved.

15. Defendants examined witness Rahul Donde by filing his evidence affidavit at Exh. 30. By the said witness defendants are tried to invalidate the evidence led by plaintiff. It was tried to bring on record that the transaction between plaintiff and defendants is a money lending transaction and plaintiff instead-of executing mortgage deed had taken undue advantage of ill-literacy of defendants and got executed agreement to sale, however, the documents brought on record by plaintiff is a registered document. In this regard section 92 of the Indian Evidence Act is very much relevant. Let us go through section 92 of the Indian Evidence Act -

Section 92 - When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :-

Proviso (1) - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1 [want or failure] of consideration, or mistake in fact or law.

Proviso (2) - The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be

proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3) - The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4) - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5) - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6) - Any fact may be proved which shows in what manner the language of a document is related to existing facts.

16. Considering the aforementioned provision, it is apparently clear that the oral evidence is clearly excluded against the document which is reduced into writing and duly registered. Except the bare words of defendants there is nothing in black and white on record contrary to the registered document therefore, from the evidence brought on record I am of considered opinion that plaintiff has established the fact of execution of agreement to sale between the parties. Hence, I answer issue No. 1 in affirmative.

Evidence, appreciation and discussion with regard to issue**No. 2 -**

17. Before starting discussion on this issue I would like to mention here that, it is the case of plaintiff that he has paid consideration amount of Rs. 7,00,000/- and the balance consideration was Rs. 92,000/- which has to be paid on execution of sale deed. However, in this issue the advance consideration amount is mentioned as Rs. 92,000/- therefore, in the light of the pleading of the parties, I proceed to decide issue No. 2 for the advance consideration amount of Rs. 7,00,000/-.

18. Now, coming back to the evidence of plaintiff it reveals that, in his evidence he has specifically stated the mode of payment. According to him, he has paid Rs. 2,15,000/- by cheque bearing No. 200010 dated 12th February 2015 and Rs. 4,85,000/- by cheque bearing No. 200011 dated 13th February 2015. In such a way, he has paid total consideration of Rs. 7,00,000/- to defendants. From the agreement to sale it manifest that, defendants have received Rs. 7,00,000/- and the balance consideration amount is Rs. 92,000/- which was agreed to be paid at the time of execution of the sale deed. It was further agreed that the possession of the suit property is to be handed over after the execution of sale deed. It is pertinent to state here that, the said document is a registered document and there is no contrary proof on record to wash out the said evidence. Hence, I answer issue No. 2 in affirmative.

Evidence, appreciation and discussion with regard to issue**No. 3, 4 and 7 -**

19. According to plaintiff, he is ready to pay remaining amount to get executed sale deed of suit property in his favour. It is his evidence that, he sent notice to defendants for execution of the sale deed on 09th July 2015 and it has been served on defendants on 10th July 2015. Plaintiff has brought on record the copy of said notice. Defendant No. 1 in her cross-examination admitted the receipt of notice and further admitted that they have not replied the said notice. It is pertinent to state here that, the said notice is for execution of sale deed. From the admitted facts by defendants and from perusal of notice itself it reveals that the said notice is for execution of sale deed of the suit property.

20. It was tried to bring on record by defendants that, it was a money lending transaction and plaintiff is a builder and it is not difficult for him to pay Rs. 92,000/- when the agreement was allegedly executed. In this regard, it would be appropriate to mention here that though it is the defence that it was a money lending transaction however, except bare words there is nothing on record to contradict the documentary proof brought on record by plaintiff. Had it been the fact that it was a money lending transaction, then defendants could have examined a person who has taken money from plaintiff to show his money lending business. However, there is no such evidence on record. Therefore, I can safely lay my hands on the evidence brought on record by

plaintiff to hold that plaintiff is ready and willing to perform his part of contract.

21. In **Hariba's** case Hon'ble Bombay High Court observed that, averments of readiness and willingness in the plaint, one has to see the pith and substance of the plea. Preference has to be given substance and not to a mere format. In the case at hand, plaintiff has proved the agreement to sale and the same has been admitted by defendant No. 1. However, the ruling cited demonstrates different facts than the case at hand.

22. I have gone through case of **Kishor's**. In the case at hand, defendant No. 1 during cross-examination admitted the fact of agreement so also her witness Rahul Donde also admitted the execution of agreement in his presence. Moreover, it is admitted fact that plaintiff sent notice which is duly received by defendants for the specific performance. Therefore, the ratio laid down in the cited case is applicable to the case at hand.

23. In the case of **Chintaman** Hon'ble Bombay High Court, Bench at Nagpur observed that, voluntary execution of agreement by defendants established the fact that plaintiff is entitled to specific performance. In the case at hand, plaintiff as well as defendant No. 1 admitted in cross-examination the execution of the document i.e. agreement to sale. Therefore, the ratio laid down in the cited case is certainly applicable to the case at hand.

24. It is pertinent to state here that, plaintiff has paid a substantial amount of Rs. 7,00,000/- to defendants. The said transaction was of the year 2015 and since then defendants have not performed their part of contract even though plaintiff was ready to do the same. It is pertinent to state here that, as per section 20 of Specific Relief Act, granting specific performance is a discretionary relief. Hence, from the evidence brought on record I hold that plaintiff is entitled for specific performance of agreement to sale dated 12th February 2015. Hence, I answer issue No. 3, 4 and 7 in affirmative.

Evidence, appreciation and discussion with regard to issue

No. 5 -

25. According to plaintiff, defendants are intending to create third party interest in the suit property. However, how defendants are trying to create third party interest is nowhere brought on record by plaintiff. It is pertinent to state here that, when plaintiff came with specific contentions that defendants are trying to create third party interest, in that case it is for the plaintiff to bring on record any public notice or any document which is got executed between defendants and third person or plaintiff could have brought on record the fact that defendants have shown the suit property to other person with an intention to create third party interest. Per contra, it is evidence of plaintiff that defendants have threatened to kill him and will sale out suit property, however, in spite of receipt of threat he has not lodged any complaint with police authorities against defendants. To substantiate his

contentions plaintiff could have brought on record the complaint lodged with police if any. Therefore, it is highly improbable to solely rely on his bare words. Therefore, I answer issue No. 5 in negative.

Evidence, appreciation and discussion with regard to issue

No. 6 -

26. From the foregoing discussion on issue No. 1 to 4 it has been held that plaintiff is entitled for specific performance. By not granting the relief of specific performance actual damage would cause to plaintiff. Had it been the fact that the possession of suit property is not handed over to plaintiff, however, admittedly an agreement to sale was executed between plaintiff and defendants. Furthermore, from the agreement to sale it clearly manifest that plaintiff has paid Rs. 7,00,000/- towards part consideration of the sale transaction. In such set of facts, if defendants are not restrained from creating third party interest in the suit property, in that case plaintiff will suffer irreparable loss. Hence, I answer issue No. 6 in affirmative.

Evidence, appreciation and discussion with regard to issue

No. 8 -

27. Before starting discussion on this issue I would like to mention here that, the date mentioned in this issue as 2nd April 2015 is not the date of agreement in dispute. The date of agreement is 12th February 2015. Therefore, in the light of pleading of both the parties I considered the date of agreement

to sale as 12th February 2015 instead-of the date which is mentioned in the present issue.

28. Now, let us begin discussion on this issue considering the adte of agreement 12th February 2015 from the pleadings of the parties and the documents brought on record. According to defendants, marriage of defendant No. 2 was fixed on 02nd April 2015. Father of defendant No. 2 and 3 and husband of defendant No. 1 died in the year 2007 and he has not left any amount for the sake of marriage of defendant No. 2. It is evidence of defendant no.1 that, for the marriage of her daughter i.e. defendant No. 2 she was in financial need. Rahul Donde informed them that plaintiff is doing money lending business and he is the builder and he will help her to transfer the suit property in their name. In this way, plaintiff has gained their confidence and faith and plaintiff agreed to pay money for her daughter's marriage.

29. It is her evidence that, since plaintiff was not having a license for money lending business therefore, he asked to mortgage suit property in his favour and accordingly, in the pretext of execution of the mortgage deed plaintiff got executed agreement to sale by playing fraud on them. The said document was not even read by defendants. According to defendants, on 12th February 2015 the cheque issued by plaintiff for amount of Rs. 2,15,000/- was en-cashed in bank in presence of mediator Rahul Donde. At that time, her son

was present with her. Plaintiff has taken the entire amount from defendants towards the payment of interest on the amount. On 13th February 2015 amount of Rs. 1,75,000/- was received by plaintiff through his mediator Rahul Donde from the cheque. At that time, her son and her relative Rangnath Yashwante were present. The document of agreement to sale is a hallow document and the consideration amount shown in the document has never been received by them.

30. D. W. No. 2 Rahul Donde deposed the same facts like defendant No. 1. However, from the cross-examination of defendant No. 1 it has been established that on 12th February 2015 the agreement of suit property was executed and it was registered on 05th March 2015. Her cross-examination demonstrates that the limitation for execution of sale deed was six months from the date of agreement. Rahul Donde in his cross-examination admitted that, he signed agreement to sale as a witness of the document and he read the said document. He further admitted that, for the contents of the said document he and defendants had no objections. He further admitted that, on the said agreement to sale plaintiff has paid Rs. 7,00,000/- to defendants by way of cheques. It is pertinent to state here that, defendants have come with a specific defence that execution of agreement to sale by plaintiff is got executed by playing fraud upon them. However, how the fraud is played has neither been proved by defendants nor by their witness. Per contra, defendant No. 1 and her witness Rahul Donde have categorically admitted the execution of

agreement to sale by the plaintiff. Moreover, D. W. No. 2 Rahul Donde admitted the fact of receipt of consideration of Rs. 7,00,000/- by defendants. Therefore, the evidence of defendants is extremely lacking on the proof of playing fraud upon them by plaintiff. Therefore, I answer issue No. 8 in negative.

Evidence, appreciation and discussion with regard to issue

No. 9 -

31. From the findings arrived at issue No. 1 to 8, in answer to issue No. 9 I proceed to pass following order.

ORDER

1. Suit is decreed with cost.
2. Defendant No. 1 to 3 are directed to execute sale deed in favour of plaintiff within three months from the date of this order.
3. Plaintiff is directed to pay remaining sale consideration amount of Rs. 92,000/- to defendant No. 1 to 3 on the day of execution of sale deed.
4. Defendant No. 1 to 3 are permanently restrained from creating third party interest in the suit property till execution of sale deed.
5. Decree be drawn up accordingly.

(Dictated and pronounced in open Court.)

Place :- Nashik.
Date :- 07-12-2023.

sd/-xxx
(Smt. Deepali Parimal Kaduskar)
3rd Jt. Civil Judge Senior Division,
Nashik.