

Received on : 10/03/2017.
Registered on : 14/03/2017.
Decided on : 27/02/2020.
Duration : Ys. Ms. Ds.
02 11 13

IN THE COURT OF THE 5th JT. CIVIL JUDGE SENIOR DIVISION
AT OSMANABAD.

(Presided over by : A. M. Patankar)

CNRNo.MHOS020006382017

Spl.C.S No.13/2017

Exh. No.

01. Vitthal Vishwanath Barade
Age : 65 years, Occu.: Agriculturist,
R/o. Bembli, Tq. & Dist. Osmanabad, ...**Plaintiff.**

VERSUS.

01. Lalita Balaji Zore
Age : 38 years, Occu.: Household & Agriculturist,
R/o. Kangara, Tq. & Dist. Osmanabad.
02. Balaji Arjun Zore
Age : 48 years, Occu.: Agriculturist,
R/o. As above.
03. Krishna Balaji Zore
Age : 17 years, Occu.: Education,
R/o. As above.
Through- Guardian defendant No.1.**Defendants.**

**CLAIM: SUIT FOR SPECIFIC PERFORMANCE AND PERMANENT
INJUNCTION**

Advocate for the plaintiff : Shri. S. B. Kocheta.
Advocate for the defendants : Shri. N. G. Terkar.

J U D G M E N T

(Delivered on 27/02/2020)

01. The plaintiff has filed the present suit for specific performance of the agreement to sale as well as for permanent

injunction in respect of the suit property.

02. The contentions of the plaintiff are as follows:

The 79 R land in Gat No. 430 Mouje Kangara, Taluka & District- Osmanabad more elaborately described in plaint para No. 2 is the suit property. The plaintiff is the resident of Mouje Bembli, Taluka & District Osmanabad. The defendant is the resident of village Bembli near village Kangara. The plaintiff and the defendants are adjacent land owners. The defendant No.1 is the wife of defendant No.2 and the mother / guardian of defendant No.3. In the revenue record the suit property is in the name of minor defendant No.3. Accordingly, the entry has been done even in the 7x12 extract of the suit property.

03. The defendants had sought to sale the suit property to repay the loan taken for the marriage of their daughter. The plaintiff and the defendants mutually decided the price of the suit property to Rs.7,75,000/-. Accordingly on 09-08-2014 the defendants executed agreement to sale (Isar Pavati) in favour of the plaintiff. The defendants accepted Rs.6,75,000/- on 09-05-2014 towards the agreement to sale. The defendants agreed to take the permission in respect of sale of minor's property from the Court and to execute the sale-deed after accepting the balance consideration amount. Thereafter, on 09-01-2015 the defendants accepted Rs. 15,000/- in cash. On repeated request of the plaintiff, the defendants filed application before the Hon'ble District Court bearing Civil Miscellaneous Application No. 85/2015 for permission to sale the minor's property. On 27-11-2015 the Hon'ble District Court, Osmanabad allowed the prayer of the defendants. Thereafter, the defendants demanded some amount out of the agreed consideration and the plaintiff has paid the same. The defendants have also given receipt in respect of the said payment on 03-11-2015 on a

Rs.100/- stamp paper. The said receipt was prepared in presence of two witnesses namely Kavita Shivkumar Waghmare & Swati Santosh Gadekar. The defendants have received the amount of agreement except Rs. 42,725/- in the said receipt. The Hon'ble District Court had directed to open a fixed deposit of Rs. 1,00,000/-, in the name of the minor defendant No.3 while giving permission to sell. The defendants sought the remaining amount of Rs. 42,725/- to comply the said order of Hon'ble District Court. The plaintiff immediately gave the amount of Rs. 42,725/- in cash on 10-12-2015. The defendant has given proper receipt putting her thumb impression. The defendants agreed to open fixed deposit of Rs. 1,00,000/-, in the name of defendant No.3 in a nationalized bank and to produce the photo copy of the same in the Hon'ble District Court. The defendants avoided to open the fixed deposit as agreed and therefore the plaintiff sent notice to the defendants through his advocate. On receipt of the legal notice the defendants showed readiness to comply the directions of the Hon'ble District Court and to execute the sale deed. The defendants did not keep their word and they did not even send written reply to the notice. Thereafter, on 18-02-2017 the defendants tried to disturb the agricultural work of the plaintiff in the suit property. They also denied to execute the sale-deed as per agreement and threatened to disturb the possession continuously.

04. The defendant Nos. 1 to 3 have resisted the suit filing written statement at Exh.32. The case of the defendants is as follows.

05. The Hon'ble District Court Osmanabad has allowed the application to sell the property of minor defendant No.3 on 27-11-2015. The Hon'ble District Court has also directed to open the fixed deposit of Rs. 1,00,000/- in the name of minor defendant No. 3. Though it is so

the defendants do not agree to give the sale deed in the favour of the plaintiff. The plaintiff is the private money lender. There was oral sale agreement between the plaintiff and the defendants in respect of the suit property. The plaintiff had agreed to give consideration of Rs. 18,00,000/-. In spite of such oral agreement the defendants executed the agreement to sale of Rs. 7,50,000/- on request of the plaintiff. The plaintiff has given only Rs.42,725/- in respect of the agreement to sale. The plaintiff had promised to give the remaining amount bringing the same to the house of the defendant, but till date he has not given the amount. The defendants have demanded Rs. 18,00,000/- from the plaintiff time to time but he has not paid the same. The plaintiff has taken disadvantage of the illiteracy of the defendant. They are also ready to give Rs. 42,725/- taken towards agreement to sale. The plaintiff has duped the defendants applying very less price for the suit property than the market rate. Hence the suit be dismissed.

05. Having gone through the rival contentions of the plaintiff and the defendants the following issues have been framed which are answered below with reasons to follow.

Nos.	ISSUES	FINDING
01.	Does the plaintiff prove that, the defendant No.1 executed agreement to sale in (Isar Pawati) in respect of suit property in his favour on 09-08-2014?	...Yes.
02.	Does the plaintiff prove that, the defendant No.1 had obtained the permission of Hon'ble District Court to sale the suit property ?	...Yes.
03.	Does the plaintiff prove that the total consideration of the transaction of Rs. 7,75,000/- was paid to the defendants?	...No.
04.	Does the plaintiff prove that in spite of his	...Redundant.

	readiness and willingness the defendants have refused to execute the sale-deed	
05.	Do the defendants prove that plaintiff is a private money lender ?	...No.
06.	Whether the plaintiff is entitled to decree of specific performance as sought ?	...No.
07.	Whether the plaintiff is entitled to permanent injunction as sought ?	...No.
08.	What order and decree ?	As per final order.

REASONS

06. To substantiate the suit claim the plaintiff has filed his evidence affidavits at Exh. 14 & 20. The plaintiff has also relied upon the evidence of Vinod Popat Barde (P.W.No.2) (Exh.21) and Akhil Shafiulla Shaikh (P.W. No.3) (Exh.22). Besides the above evidence the plaintiff has relied upon the following documents.

1. The agreement to sale (Isar Pavati) dated 09-05-2014 (Exh.33)
2. Certified copy of the order of the Hon'ble District Court M.A. No.85/2015 (Exh.6)
3. The receipt of Rs.100/- stamp paper (Exh.34)
4. Plain receipt dated 10-12-2015 (Exh.35)

07. The defendants have relied upon the evidence of defendant No.1 Sou. Lalita Balaji Zore (D..W.No.1) (Exh.21). The defendants have not filed any specific document in support of their case.

AS TO ISSUE No.1 :-

08. So far as execution of agreement to sale dated 09-08-2014 is concerned, the plaintiff has produced the original agreement to sale

(Exh.33.). Though the defendants have admitted some of the contentions in plaint para No.3, the over all case in written statement suggest that the defendants are denying the execution of the sale deed as per actual understanding. Sou. Zore (D.W. No.1) admits that on 09-05-2014 the agreement to sale was executed between her and the plaintiff before the sub-registrar, Osmanabad. The only dispute the defendant No.1 raising is non payment as per actual understanding of the consideration. Therefore, there is no difficulty in accepting the execution of the agreement to sale on 09-08-2014 . Hence, I answer issue No.1 in the affirmative accordingly.

AS TO ISSUE No.2 :-

09. According to the plaintiff the defendant No.1 has obtained permission of Hon'ble District Court for executing sale deed in favour of the plaintiff. The plaintiff has placed on record he certified copy of the order of Hon'ble District Court in M.A. No.85/2015 (Exh.6). This fact has not been denied by the defendants, but they are denying the other contentions in plaint para No.6 as to demanding money from the plaintiff to open the fixed deposit. On perusal of the evidence of Sou. Zore (D.W. No.1) it is clearly seen that she has admitted the fact of approaching Hon'ble District Court to take the permission for sale of the minor son's land. Zore (D.W. No.1) has categorically denied completion of the sale transaction. Though it is so, in view of the above evidence the issue No.2 is required to be answered affirmatively. Hence, I answer issue No.2 in the affirmative.

AS TO ISSUE No.3 & 5 :-

10. The defendants have countered the contentions of the plaintiff alleging private money lending against him. Though it is so,

the defendants have not brought any evidence to substantiate their allegation. Therefore without pondering much over this issue, it has to been negated at once.

11. According to the plaintiff he has paid the total agreed consideration of Rs.7,75,000/-. The crux of the defence is the non payment of the agreed consideration. Therefore, the evidence in respect of payment of agreed consideration is to be looked in to very carefully. The plaintiff states that he has given part agreement amount of Rs. 6,75,000/- to the defendants on 09-08-2014 in cash. This fact has been denied by the defendants. Therefore, the plaintiff ought to have given reliable evidence to establish the actual payment of this amount. On perusal of the documents produced by the plaintiff, there appears no specific receipt as to payment of Rs.6,75,000/- on 09-08-2014. The agreement of sale (Exh.33) being registered document definitely has presumptive value, but that does not absolve the requirement of proper proof as to payment of actual agreed consideration. At this juncture is to be born in mind that the defendants are illiterate persons and the defendant No.1 does not even know to put a signature. This has been admitted even by the witnesses of the plaintiff. Therefore, the agreement to sale is required to be scrutinized in the light of these facts.

12. The plaintiff has relied upon another receipt dated 03-11-2015 (Exh.34). It is the contention of the plaintiff that vide this receipt the defendant No.1 has accepted the entire payment except Rs. 42,725/-. Further, according to the plaintiff he has given last amount of Rs.42,725/- on 10-12-2015 vide receipt (Exh.35). Out of these two receipts it appears that the plaintiff has not proved either. Though the plaintiff has produced the original receipt dated 03-11-2015 (Exh.34), it has not been proved by evidence any of the witnesses thereon. The

In this receipt there is mention of receipt of amount of Rs.7,32,275/- and the amount in figure appears to have been written by separate by different ink. It is very clear that this amount in figure is adjusted letter on in the actual writing. This difference of ink can be seen by naked eyes and does not require any expert report. Therefore, the receipt dated 03-11-2015 can not be relied upon.

13. Secondly, the receipt dated 10-12-2015 mentions about defendant No.1 receiving Rs. 42,725/- in cash. The defendant No.1 herself has admitted receipt of this amount in her written statement. So far as the other contents of this receipt are concerned, the witness on the same Akhil (P.W. No.3) has denied to have remained present at the time of executing agreement to sale. He has also admitted that no money of transaction was given in his presence.

14. Though the plaintiff has heavily relied upon the agreement to sale (Exh.33), it appears that the contents of the agreement to sale have not been properly established. The defendant No.1 has candidly admitted the execution of the agreement to sale (Exh.33) but she has very clearly stated about non payment of amount as agreed. Therefore it was the burden of the plaintiff to give proper evidence in respect of time to time the payment of agreed consideration.

15. The plaintiff is also relying upon the permission given by the Hon'ble District Court to sale the minor,s property. It is the case of the plaintiff that subsequent to agreement to sale in question the defendant no.1 sought permission from the Hon'ble District Court, Osmanabad. The plaintiff has filed the certified copy of Exh.1 and the order of Hon'ble District Court, Osmanabad in M.A. No. 85/2015 at Exh.6. It is also case of the plaintiff that the Hon'ble District Court had

directed to deposit Rs. 1,00,000/- in the name of minor son of the defendant No.1. The order in M.A.No. 85/2015 before the Hon'ble District Court, Osmanabad clearly mentions such direction. This direction of Hon'ble District Court has much importance in view of welfare of the minor holder of the land. When the evidence on hand is seen in respect of the compliance of the Hon'ble District Court Osmanabad, it appears that the plaintiff has failed to show such payment. According to plaintiff he has given Rs.42,725/- lastly out of the remaining Rs. 1,00,000/-. It is surprising that the plaintiff has not taken receipts of prior amounts after the contended payment of Rs.6,75,000/- to the defendant No.1. That means the plaintiff has produced only one receipt dated 10-12-2015 to show entire payment of Rs.1,00,000/- as per the direction Hon'ble District Court, Osmanabad. There is no receipt on record to show payment of Rs. 15,000/- dated 09-01-2015. Similarly, the plaintiff has not given explanation as to the other amounts to make up Rs. 1,00,000/-than a receipt dated 03-11-2015 which is already found to be unworthy of reliance. The totality of the evidence shows that though there is a registered agreement to sale on record the plaintiff has failed to give probable evidence to substantiate actual payment of the agreed consideration in respect of suit property. Therefore I answer issue No. 3 & 5 in the negative.

Issue No.4 -

16. It has been found that the plaintiff has failed to show payment of actual agreed consideration in respect of the suit property. It is the case of the plaintiff that he has already paid the entire amount of consideration of Rs. 7,75,000/-and as such now it is for the defendant No.1 to execute the sale-deed. In view of the negative finding to issue No.3, the contention of the plaintiff that he is ready and willing

to execute the sale-deed becomes redundant. Hence, I answer issue No.4 accordingly.

Issue No. 6 to 8 -

17. The grant of specific performance is an equitable relief. It being so the specific performance need not be granted merely because agreement to sale is technically proved. In the suit on hand though the plaintiff has proved the agreement to sale (Exh.33), there is ambiguity in respect of the agreed consideration amount and payment to the defendant No.1. There is no proper evidence as to contended case of time to time payment except admitted payment of Rs. 42725/-. Under such circumstances the plaintiff is not entitled to decree of specific performance merely on the basis of registered agreement to sale.

18. It is to be noted that the suit for specific performance and the one for permanent injunction cannot go together. These prayers having different cause of action and counting of limitation are to be filed separately. Therefore, the suit is definitely bad in respect of the second prayer of permanent injunction. Accordingly issue as to permanent injunction to be answered negatively.

19. Having found that the plaintiff is not entitled to specific performance, the equitable order as to admitted payment of Rs. 42,725/- is to be passed. This aspect cannot be left hanging. Before concluding the judgment the matter was kept back till 5.45 p.m. awaiting the presence of the plaintiff and his learned advocate. Neither of them came before the court to know the conclusion of the judgment. They have not filed any application to amend the plaint and to add the alternate prayer as to refund of admitted payment of amount. Though it is so, as stated earlier it will not be appropriate to leave the matter of

refund to be decided by another litigation for the same. The learned advocate for the defendants has candidly conceded to repay the agreed payment of Rs. 42,725/- alongwith interest of 6% for per annum. In my considered opinion such refund of admitted payment would be in the interest of justice, though there is no specific prayer.

20. In the facts and circumstances of the matter it will be appropriate to make the parties to bear there own cost. Hence, I answer issue No. 6 and 7 in the negative and proceed to pass the following order in answer to issue No. 8.

Order

01. The suit is dismissed.
02. The defendants are directed to refund amount of Rs.42,725/- to the plaintiff alongwith interest of 6% for per annum until the realization of the entire amount within 3 months.
03. Parties to bear their own cost.
04. Decree be prepared accordingly.

(Pronounced in open court)

Date : 27/02/2020

Place : Osmanabad

(A. M. Patankar)
5th Jt. Civil Judge, Senior Division,
Osmanabad.