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**(1987) 07 BOM CK 0047**

**In the Bombay High Court**

**Case No : Second Appeal No. 459 of 1980**

Himatlal Purshottam Shah

APPELLANT

Vs

Supadu Pavanu Hadge and Others

RESPONDENT

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**Date of Decision : 24-07-1987**

**Acts Referred:**

Specific Relief Act, 1963 — Section 16  
Transfer of Property Act, 1882 — Section 40

**Citation : (1987) 3 BomCR 330**

**Hon'ble Judges : Sharad Manohar, J**

**Bench : Single Bench**

**Advocate : V.V. Divekar, for the Appellant; P.N. Kerlekar, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

Sharad Manohar, J.—The plaintiff's honest suit for specific performance has been dismissed by the lower Appellate Court on a ground involving hyper technicality, least warranted by any of the provisions of law.

2. The facts are as follows :---

The land in question (hereafter, the suit plot of land), S. No. 196/7, admeasures only 7 Ares, that is to say about 7 Gunthas. But it is situate within the municipal limits of Savda, Taluka, Raver. At the relevant time, it belonged to defendant No. 1 and original defendant No. 2 Topulu (who died pending this litigation). I will refer to both these persons as defendant Nos. 1 & 2 respectively. Defendants Nos. 1 and 2 executed a registered lease dated 6th July, 1962 in favour of the plaintiff. The period of the lease fixed was 10 years. There was an option to have a further renewal of the lease in favour of the plaintiff. But what is important, defendant Nos. 1 and 2 had also agreed that if they wanted to sell the particular plot of land to anyone the plaintiff would have the first right of purchase, meaning thereby the first right of refusal. In other words, the right of pre-emption was given to him. But what is even more important is that on

27-10-1969 defendant Nos. 1 and 2 in fact entered into agreement with the plaintiff for purchase of the suit plot of land for a sum of Rs. 1100/-. It must be stated, at the cost of repetition, that the plaintiff was already in occupation of the plot of land as a tenant and that this Agreement of Sale was executed by the land lord in favour of the tenant, who was already in possession. This has relevance with reference to the question as to whether the plaintiff had not agreed to pay adequate price to the defendants. As will be presently pointed out, it is not and cannot be the contention of any of the defendants that the price was inadequate.

In spite of the Agreement dated 27-10-1969 in favour of the plaintiff defendant Nos. 1 and 2 executed a Sale Deed in favour of defendant No. 5 for sale of the same plot of land for a sum of Rs. 1200/-. This has quite some significance, because from that it will be seen that the price of Rs. 1100/-, for which the defendants had agreed to sell the plot to the plaintiffs, could not be held in any way as inadequate having regard to the fact that defendant No. 5, who was not in possession, has offered and paid only Rs. 1200/- for the same plot.

A few more facts may be stated to show that the lease in favour of the plaintiff was a genuine transaction and, further, that he was actually inducted in possession of the suit plot of land. As observed by the lower Appellate Court itself in para 11 of its judgment, the Agreement of Sale as also the lease were taken into consideration by the Tahsildar at the time of re-grant of the said plot of land to defendant No. 1 and taking that into consideration, the re-grant was made by the Tahsildar on 23-2-1968 in favour of defendant No. 1 subject to the rights of the lessee. viz. the plaintiff.

The plaintiff intended to install a Petrol Pump and carry on other allied business on the plot of land, and there is evidence led by him, which is accepted by the lower Court, that he had made all the necessary arrangement in that behalf.

However, in view of the above mentioned Sale Deed dated 28th November, 1969 executed by defendant Nos. 1 and 2 in favour of defendant No. 5, the present suit as filed by the plaintiff against the defendants for specific performance of the said Agreement dated 27th October, 1969 as also for injunction restraining defendant No. 5 from interfering with the plaintiff's suit plot of land.

3. Defendant Nos. 1 and 2 came out with the usual pleas into their Written Statement :---

- (a) denying the lease;
- (b) alleging that the agreement was without consideration;
- (c) contending that it was obtained by fraud;
- (d) denying further that the plaintiff was ever put in possession of the suit plot of land.

Their contention was that they were in possession of the suit plot of land till the

date of their Sale Deed in favour of defendant No. 5 and that they have delivered possession to defendant No. 5 upon the Sale Deed executed in his favour. They also denied the receipt of Rs. 510/- which was the amount paid by the plaintiff to each of the two defendant, Nos. 1 and 2, (Rs. 255/- to each). Their further contention was that the two receipts, which evidence the Agreement of Sale, were forged and fabricated document brought into being with a view to create false evidence. They also contended that the plaintiff has become insolvent and, hence, was trying to create false evidence in order to improve his financial condition.

4. The case of defendant No. 5, in this Written Statement was in no way better. He also contended the same pleas of fraud and what not. He contended that the plaintiff has become insolvent and was, therefore, trying to improve his financial condition by this deceptive means. But he further contended that he was a bona fide purchaser for value without notice in respect of the Agreement of Sale in favour of the plaintiff.

5. In connection with these pleadings, the most important position to be noted at this stage itself is that there was a specific averment made in the plaint that the plaintiff had entered into the Agreement for purchase of the suit plot of land from defendant Nos. 1 and 2, that he had paid Rs. 255/- to each of defendant Nos. 1 and 2 (total Rs. 510/-) as Earnest Money and further, that he was ready and willing to perform his part of the contract. Unfortunately this technicality of the common law has been imported into our body of law by virtue of section 16 of the Specific Relief Act. But the point is that this technicality was fully complied with by this plaintiff. There existed this averment in the plaintiff's plaint. The further point is that this averment was not denied by any of the defendants.

6. On these pleadings, issues were framed by the learned Judge. It is unnecessary to refer to the other issues, because findings on all the issues are recorded in favour of the plaintiff and nothing was brought to my notice to justify interference with those findings. Point is that there was no issue framed on the question whether the plaintiff was ready and willing to perform his part of the agreement or not and this could not be otherwise, because the defendant had not at all denied the plaintiff's readiness and willingness to perform his part of the Agreement, the averment in respect of which was made by him specifically in the plaint.

After the Written Statement was filed by the defendants, the plaintiff got the plaint amended by adding an averment that he was also entitled to have the Sale Deed execute by defendant Nos. 1 and 2 and/or by defendant No. 5 because he was entitled to pre-empt defendant Nos. 1 and 2 on the basis of the pre-emption clause contained in the lease-deed.

There is no dispute that the plaintiff's right of pre-emption was denied by the defendants at least by implication.

7. On these issues, the parties went to trial and led evidence. The plaintiff proved

the agreement of Sale. The plaintiff led evidence of this Agreement of Sale. The plaintiff also led evidence regarding possession of the suit plot of land. The plaintiff proved the registered lease deed. It followed that he also proved the clause of pre-emption contained in the lease deed. He led evidence as regards the evidence of sale. He also led evidence as regards the possession of the suit plot of land. The only thing he did not do was that he did not utter or chant the mantra in his evidence that he was ready and willing to perform his part of the contract, viz. the payment of the balance of Rs. 550/-. The reason why I call this chanting of mantra is that there is abundant evidence on record to show that the plaintiff was always ready and willing to perform his part of the contract. The various averments made in the plaint, which are not denied, show that his readiness and willingness was never in dispute. There was no issue framed on the question whether he was not ready and willing to perform his part. His statement in the evidence that he was ready and willing to perform his part would not carry his case an inch further. If there was other evidence to show that he was ready and willing, his mere statement would be of no further consequence. On the other hand, if the other evidence showed that his readiness and willingness was only skin-deep, the chanting of the particular statement in the evidence would be of no avail. But the fact remains that such a statement was not made by him in his evidence.

8. The trial Court negatived the defendants' that the suit agreement was the result of any fraud practised by the plaintiff. But it seems to have taken the view that so far as the plaintiff's right of pre-emption was concerned, that condition was inserted in the receipts by fraud. It negatived the defendants' contention that the lease deed was a hollow document without consideration or that the agreement was of such character. But, it held that the plaintiff had not proved the agreement at all and that the payment of Earnest Money of Rs. 255/- to each of defendants Nos. 1 and 2 was also not proved. From this, it followed that the learned Judge could not order specific performance as prayed for by the plaintiff.

9. In Appeal, the learned Asstt. Judge has set aside practically all the findings against the plaintiff. He has held that the plaintiff has a right of pre-emption in respect of the suit plot of land. He has also held that the Agreement of Sale pleaded by the plaintiff has been proved. He has likewise held that the plaintiff was in possession of the suit plot of land in pursuance of the lease deed. He has negatived the contention of defendant No. 5 that he was a bona fide purchaser for value without notice of the plaintiff's Agreement of Sale. He has also held that there was no substance in the defendant's plea of the bar of limitation .

These are the only pleas urged by the defendants which deserve consideration and all the pleas on which finding recorded by the learned Judge is in favour of the plaintiff. But still it has dismissed the Appeal and confirmed the decree of dismissal of the suit on a ground which appears to me to be too very fickle. He has held that although the plaintiff had made an averment in the plaint that he was ready and willing to perform his part of the contract, no statement from him

as such came to be uttered during his oral evidence before the Court that he was ready and willing to perform his part of the contract. In Para 24 of his judgment, the learned Judge has in fact pointed out the mistake committed by the trial Court in holding that the plaintiff had not made appropriate averment in the plaint about his readiness and willingness to perform his part of the contract. He has held that the plaint did contain such averment to a sufficient extent. But what he has held further is that the plaintiff had not served any notice upon the defendants for specific performance of the Agreement. Further he has observed that the plaintiff has not deposed about his readiness to pay the balance of the amount. Further, he has observed as follows :---

"He did not depose about this readiness as to pay the balance amount, nor did he say in express words that he was ready and willing to perform his part of the contract during his deposition."

This according to the learned Judge, amounted to failure on the part of the plaintiff to prove his readiness & willingness to perform his part of the contract and it is on this ground that the learned Judge has proceeded to confirm the decree of dismissal passed by the trial Court.

10. To my mind, the view is perverse. The learned Judge has himself held that there is averment made in the plaint to the effect that the plaintiff was ready and willing to perform his part of the contract. I have waded through the entire Written Statement but could not find one single denial of this averment. Somewhat amazingly, Mr. Karlekar, appearing for defendant No. 5, urged before me that the allegation of insolvency made against the plaintiff amounted to denial of his readiness and willingness to perform. But even that allegation, apart from being somewhat meaningless and irrelevant, goes to prove that the plaintiff was very much willing to perform his part of the contract. The allegation is that the plaintiff became almost insolvent. Mr. Karlekar says that this particular allegation is in general sense of insolvency, that is to say the general sense of financial incapacity and not of any adjudication of his insolvency by the Court. I assume that he is right. But the point is that what is further stated is that because the plaintiff has become insolvent he was trying to get over his financial difficulty by getting the Sale Deed in respect of the land. As rightly pointed out by Mr. Divekar, this in fact means that the plaintiff was, even according to the defendants, anxious to purchase the land. Far from spelling out absence of readiness and willingness to perform, this averment in the Written Statement be stated to be affirming, the plaintiff's readiness and willingness to perform his part of the contract.

Whatever that might be, fact remains that there existed no denial in the Written Statement about the plaintiff's averment that he always was and is ready and willing to perform his part of the contract. In this connection, what is required to be noted is that the balance of consideration was only Rs. 550/- and the very expenses of the litigation must have far exceeded that amount. It would be inconceivable that the plaintiff, who had gone to the extent of filing a suit for

specific performance of the contract, would not be ready and willing to pay just a modicum of the sum of Rs. 550/- to the defendants to get the Sale Deed from him. But I will deal with that part of the question a little later. Here it is to be noted that the plaintiff's averment that he was ready and willing to perform his part of the contract has not been denied by the defendants.

11. What is the result ? The result would be that there would be no issue arising on the question as to whether the plaintiff was ready and willing to perform his part of the contract. This means that it was necessary for the plaintiff to lead any further or special evidence to prove his readiness and willingness to perform his part of the contract.

Can the plaintiff then be blamed for not making any statement in his deposition that he was ready and willing to perform his part of the contract ?

The Court expected the plaintiff to lead evidence on the issue which does not exist.

12. In this connection, it is worthwhile referring to a judgment of this Court cited by Mr. Divekar reported in *Bhaurao Shamrao Bhalme and Others Vs. Mahadeo Raghu Yelekar*,

In that case, this Court has held that not only that the plaintiff has to make an averment in the plaint about his readiness and willingness to perform his part of the contract, but he has to substantiate it by means of evidence if that fact is controverted.

I have pointed out that in the instant case there was no controversy about this averment made by the plaintiff at all. The question of proving that fact, therefore, does not arise.

13. But that apart, to my mind, the basic reasoning of the learned Judge, viz. that in the absence of notice to execute the Sale Deed or in the absence of a statement by him in his evidence the fact of his readiness and willingness cannot be deemed to have been "proved", is erroneous. A fact can be proved in a million ways. Statement about his willingness during the course of his depositions is just one of the modes of proving. There can be thousands of conceivable ways in which he can prove it even without making that statement. For instance, a similar question had arisen in Second Appeal No. 76/1984 reported in *Laxman Vs. Sukhdeo*, where the plaintiff could be said to have been proved his readiness and willingness to perform his part of the contract. In that case, the plaintiff had in fact deposited the entire amount for the balance of the price in the Court on the very next day after the filing of the suit. This Court held that he proved his readiness and willingness to perform. If he had deposited in the Court but failed to make a statement in his deposition that he is ready and willing to perform, that fact by itself would not belittle his readiness and willingness. Point is that the proof about a fact need not be given only by statement in the evidence. There are many other ways in which a fact can be proved. So far as section 10 is

concerned, the averment part has got to be done in the plaint itself. But the subsequent proving part need not be restricted to the statement in the deposition. By circumstantial evidence or by documentary evidence this fact can be proved.

14. Now, in the instant case, the question of plaintiff giving notice to the defendants would not arise because by the time the plaintiff could give notice to him for sale of the suit plot of land to him, defendants Nos. 1 & 2 had already sold the plot to defendant No. 5. The fact that such a sale was made came to the knowledge of the plaintiff much later. There was no necessity or use of giving any notice thereafter.

So far the deposition part is concerned, there was no necessity to depose to that fact because the entire previous conduct of the plaintiff cries hoarse in support of his contention that he was always ready and willing to perform his part of the contract. Courts cannot ignore the major chunk of evidence consisting of circumstantial evidence and rely only upon the absence of oral evidence to hold that the particular fact is not proved. If such a view is taken by the Court, it would be a grave legal error and such an error certainly gives rise to a very substantial question of law.

15. But that apart, the further point is that on the question of the plaintiffs' right of pre-emption the Court has recorded a specific finding in affirmative in favour of the plaintiff. The plaintiff got the right to pre-empt when he learnt about the Sale Deed in favour of defendant No. 5 and thereafter he immediately rushed to the Court for pre-emption. The Court has held that he is entitled to pre-emption. The right of pre-emption is not a right exclusively of specific performance. It is something more than that. It may not be correct to hold that such right is wholly conditioned by the provisions of section 16 of the Specific Relief Act.

16. In this connection, it is to be noted that defendant No. 1 has not stepped into the witness-box at all. It is only he who would be able to state whether there was an agreement between the plaintiffs and defendant Nos. 1 and 2 or not. Only he could have stated as to whether the plaintiff was anxious to have the Sale Deed from him or not.

The further fact of significance is that while the plaintiff agreed to purchase the suit plot of land for a sum of Rs. 1100/- when he was himself a tenant in possession of the same, the plot is sold by defendant Nos. 1 and 2 to stranger defendant No. 5 just for Rs. 1200/-. Obviously, this was done with a view to cause loss to the plaintiff. Defendant No. 5 was never in possession. It is well known that when a tenant is in possession, the price that he has to pay to the landlord for purchase of the land held by him as a tenant is much less than the market price for which the plot would be sold to a person who is not in possession. The sale taken by defendant No. 5 for Rs. 1200/- gives rise to a suspicion that defendant No. 5 was indulging only in speculative transaction. In

any event, it can be said that he is not a bona fide purchaser for value without notice. The moment it is held proved, as is done by the Court below, that the plaintiff was put in possession of the suit plot of land, defendant No. 5 is deemed to have received a constructive notice about the agreement in question. In this connection, it can be seen that even the lower Appellate Court has held that defendant No. 5 is not be bona fide purchaser for value without notice.

17. Having regard to all these facts and circumstances, in my opinion the decree passed by both the Courts below cannot be sustained and the plaintiff's suit deserves to be decreed.

The Appeal is, therefore, allowed. The decree of dismissal passed by the trial Court and confirmed by the lower Appellate Court is set aside and the plaintiff's suit for specific performance as also for injunction is hereby decreed with costs throughout.