

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
FIRST APPEAL NO.1303 OF 2013

Mahesh s/o. Manohar Veer,
Age 36 years, occ. Medical
Practitioner, r/o. Kohinoor
Garden, Maliwada, Ahmednagar,
District Ahmednagar ..Appellant

Versus

- 1] Sambhaji s/o. Ashokrao Kadam,
Age 35 years, occ. Business
and Agriculture, r/o. Warwande
Lane, Maliwada, Ahmednagar,
Dist.Ahmednagar
- 2] Sau. Jayashree Krishnarao Sawant,
Age 54 years, occ. Household,
r/o.3/1/1, Suprabha Garden,
Kenjale Nagar, Pune
Dist.Pune ..Respondents

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Mr.A.V.Hon, Advocate with Mr.V.D.Hon, Senior
counsel for appellant

Mr.N.V.Gaware, advocate for respondent no.1

Mr.R.R.Karpe, advocate for respondent no.2

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CORAM : M.T. JOSHI, J.
JUDGMENT RESERVED ON : FEBRUARY 10, 2015
JUDGMENT PRONOUNCED ON : MARCH 16, 2015

ORAL JUDGMENT :

Heard both sides.

2] Aggrieved by the decree passed in a suit for specific performance of contract, original defendant no.2, who was transferee *pendent-lite* of the immovable property involved in the suit, has preferred the present appeal.

3] Respondent no.1 – Sambhaji was the original plaintiff; respondent no.2 – Sau. Jayashree was original defendant no.1. For the sake of convenience, the parties would be termed as plaintiff, defendant no.1 and defendant no.2, as arrayed before the learned trial Court.

4] According to the plaintiff, the suit plot situated in the city of Ahmednagar, as described in the plaint, was agreed to be sold by defendant

no.1 to him for a consideration of Rs.25,75,000/- vide agreement dated 4th July, 2009. The agreement was executed on 5th July, 2009. The earnest amount of Rs.51,000/- was paid and it was agreed between the parties that the transaction would be completed by the end of December, 2009. However, though the plaintiff was ready and willing to perform his part of the contract and several phone calls were made to defendant no.1, she intentionally avoided to execute the registered sale deed by accepting balance consideration amount. Therefore, visits were also paid by the plaintiff to her. Ultimately, legal notice was sent asking her to remain present in the office of the Sub-Registrar on 24th December, 2009. Though the said notice was received by defendant no.1 and the plaintiff remained present in the office of the Sub-Registrar on 24th December, 2009, defendant no.1 did not turn up, therefore, the suit came to be filed.

. During pendency of the suit, defendant no.1 had sold the suit plot to defendant no.2 and therefore, he was joined as defendant no.2 in the suit.

5] Defendant no.1 claimed that there was no contract of sale and purchase between the parties. As the husband of defendant no.1 was transferred to Pune, in fact, the suit house was given on rent to some tenant. Thereafter, the husband of defendant no.1 retired from the service from Pune and the couple wanted to settle at Ahmednagar. The tenant, however, was not ready to vacate the suit property and in the circumstances, the defendant no.1 requested the plaintiff, being a local political leader, to get the suit property vacated. At that time, the plaintiff asked defendant no.1 to execute the agreement of sale so that he would take efforts for getting the suit

property vacated. However, he took undue advantage of the execution of the document considering the helplessness of defendant no.1 and her husband. As there was no agreement between the parties, there was no question of specific performance of the same. Therefore, she wanted that the suit be dismissed.

6] Present appellant/defendant no.2 submitted that after making due inquiry, regarding the title of defendant no.1 as regards the suit property, he has purchased the same as a bona fide purchaser for construction without notice of the alleged contract between the plaintiff and defendant no.1. In fact, he being a Doctor, was looking for a suitable place for his hospital and, therefore, he purchased the suit property for a consideration of Rs.31,50,000/- on 17th July, 2010 by paying consideration through cheque, demand draft and cash amount and therefore, he wanted that the suit, as against him, be dismissed.

7] Before learned trial Court, the evidence was led from all the sides. Learned Judge came to the conclusion that there was contract of sale and purchase of the suit property between the plaintiff and defendant no.1 and the earnest amount was also received by defendant no.1. The plaintiff was ready and willing to perform his part of the contract. The plaintiff is entitled for specific performance of the contract. The transaction between the defendants is hit by rule of *lis-pendens*. Present appellant /defendant no.2 is not a *bona fide* purchaser of the suit property and, therefore, the suit came to be decreed. Hence, the present appeal.

8] Mr.Hon, learned Senior counsel for the appellant/defendant no.2 raised various issues before me. He submitted that in fact, there was no agreement between the parties. The plaintiff, being a political leader, was involved

by defendant no.1 only to get the suit property vacated and for that purpose only, the document was executed. The drafting of document manifest the same. He submitted that even otherwise, reading of the said agreement would show that time was essence of the contract i.e. the balance of consideration was required to be paid till December, 2009. The plaintiff did not pay the said consideration amount and thereafter, present appellant has purchased the said property in July, 2010. He further submitted that the plaintiff did not prove that he was ready and willing to perform his part of the contract. Even otherwise, the appellant is a *bona fide* purchaser for a consideration, without notice of the claim of the plaintiff. The appellant has even took search regarding title of the property in the office of the Sub-Registrar and thereafter, he paid the consideration amount to defendant no.1. He, therefore, submitted that judicial discretion

ought to have been exercised by the learned Judge in favour of the defendants and the suit ought to have been dismissed.

9] On the other hand, Mr.Gaware, learned counsel for respondent no.1/original plaintiff submitted that the evidence placed on record by defendant no.1 would show that there was no tenant at all in the suit property and therefore, there was no question of involving the plaintiff or executing the agreement as security, for the purpose of getting the suit property vacated. Further, admittedly, the document was executed and it was for defendant no.1 to prove that there was no contract as evidenced by it between her and the plaintiff. He further submitted that the evidence would show that the plaintiff was pursuing defendant no.1 for execution of the sale deed and ultimately, on 15th December, 2009, a registered notice was sent asking defendant no.1 to visit the

office of concerned Sub-Registrar on 24th December, 2009 to execute the registered sale deed. On that date, however, though the plaintiff was present in the office of the Sub-Registrar, defendant no.1 did not turn up. He submitted that even otherwise, time was not essence of the contract.

10] Mr.Gaware further submitted that defendant no.2 has purchased the suit property during pendency of the suit. Though, a public notice was issued regarding filing of the suit, defendant no.2 has purchased the suit property. The present appellant/defendant no.2, admittedly, is an Orthopedic Surgeon and still, on his own, upon entering into the contract with defendant no.1, he did not issue any public notice in any newspaper calling upon the objections, if any, and merely done formalities of search in the office of Sub-Registrar. Even defendant no.1 has admitted in her cross-examination, that before entering into the

contract, she made aware to defendant no.2 of filing of the suit and still he agreed to purchase the suit property. Their transaction otherwise also is hit by the rule of *lis-pendens*. In the circumstances, he submitted that the appeal may be dismissed.

11] On the basis of this material, following points arise for my determination :-

I) Whether defendant no.1 had agreed to sell the suit property to the plaintiff as pleaded by him or as to whether, the document executed was a sham document ?

II) Whether the plaintiff was ready and willing to perform his part of the contract ?

III) Whether the plaintiff is entitled for

a decree of specific performance of the contract ?

IV) Whether the transfer of the suit property by defendant no.1 to defendant no.2 is hit by the rule of *lis-pendens* ?

V) Whether the appellant/defendant no.2 is a *bona fide* purchaser of the suit property for construction, without having notice of the contract between the plaintiff and defendant no.1 ?

VI) What order ?

. My answers to point no.1 is that there was an agreement of sale between the plaintiff and defendant no.1 and the document executed between them was not a sham document. As to point no.2,

the plaintiff was ready and willing to perform his part of the contract. The plaintiff is entitled for decree of specific performance of the contract. The transfer of the suit property between the plaintiff and defendant no.2 would be hit by the principles of *lis-pendens* and therefore, the issue, as to whether, the appellant/defendant no.2 is a *bona fide* purchaser would not survive. The appeal is therefore, dismissed, for the reasons to follow.

R E A S O N S

12] Mr.Hon submitted that time was essence of the contract. He heavily relied upon the terms of the agreement of sale Exhibit 54. It should be noted that no specific plea was taken before the learned trial Court. The reading of the agreement would show that the parties had agreed that the transaction would be completed by December, 2009 and it was averred that in case, the plaintiff

would not follow the terms of the contract, the contract shall stand cancelled.

13] Normally, time does not remain essence of the contract. Here in the present case, for the reasons being forwarded lateron, it is found that the plaintiff had taken efforts for getting the sale deed executed within stipulated period by offering the balance of consideration and therefore, the issue that the time was essence of the contract, would also not remain there.

14] The issue is, as to whether, the agreement of sale is a transaction as is represented by the said document or as to whether, it is a sham document executed by defendant no.1 in favour of the plaintiff only in order to get certain tenant vacated from the suit premises.

. The agreement shows that the suit property was an open plot. Still, admittedly, certain building was standing on the suit plot. It should, however, be noted that defendant no.1, in her oral evidence, has admitted that there was no tenant in the property during the relevant period and certain dispute with her step-sister, who was occupying the suit property, was there. Defendant no.1 was evasive in the cross-examination by saying that the said step-sister might have resided in the suit property till October, 2009 or October, 2010. The agreement of sale was dated 4th July, 2009 and the transaction was to be completed by the end of December, 2009. Admittedly, a notice by R.P.A.D. was sent by the plaintiff to defendant no.1 on her correct address and even telegram (receipt Exhibit 64) was also issued, however, no reply was given to the said notice. The attesting witness of the agreement of sale has proved execution of the document.

15] It is an established principle of law that one who put a defence of execution of a sham document, the burden of proving is on him/her to prove the same. The ratio laid down the cases of (1) ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma, 1959 AIR (SC) 443*** and (2) ***Shripati Ramchandra Choudhari and ors. Vs. Rajaram Bhau Shinde and ors., 2013(1) Mh.L.J. 304*** are to the same effect.

16] The evidence on record may create certain doubts regarding genuineness of the transaction as certain material is there to show that the property was not described properly. Though, admittedly, a building was in existence over the suit property, which was described as an open plot, and further the document does not appear to be formal in nature and certain explanations were said to be given regarding urgency in the execution of the same, these facts, however, would not dislodge the fact

that excuse made by defendant no.1 for execution of the agreement i.e. for eviction of a tenant, and the same is proved to be a false one. In that view of the matter, it would have to be concluded that the plaintiff and defendant no.1 have entered into an agreement of sale as pleaded by the plaintiff.

17] The plaintiff has filed on record the proof of issuance of notice by R.P.A.D. during the period of subsistence of contract i.e. in the month of December, 2009. Even a receipt of sending a telegram was also placed on record. The evidence from the office of the concerned Sub-Registrar was collected to show that on 24th December, 2009, the plaintiff was present in Sub-Registrar's office. Certain cross-examination was directed on the issue as to whether, he was present with balance consideration to which, he deposed that he was having the same.

18] In fact, the issue as to whether, the plaintiff was ready and willing to perform his part of the contract, is to be gathered from the evidence on record and above material would show that he was very well ready and willing to pay the balance consideration and get the registered sale deed executed.

19] It is true that despite proof of existence of the contract, the court may refuse to grant specific performance of contract. However, normally, the specific performance of the contract is granted and only if certain circumstance exists having equities against the plaintiff, the decree would be denied. Here, in the present case, we find no equities and therefore, in view of the ratio laid down in the cases of (1) **Prakash Chandra Vs. Angadlal, AIR 1979 SC 1241**; (2) **Shrikrishna Danuji Sonone Vs. Vitthal s/o. Shankar Bajre, 2010(3) Mh.L.J. 175**; and (3) **Shriram s/o.**

Tukaram Avatade Vs. Ramrao Udaji Khadase,
2010(6)Mh.L.J. 653, it can very well be concluded that the trial Court was correct in granting the decree of specific performance of the contract in favour of the plaintiff.

20] As regards the application of the principles of *lis-pendens* and the defence of the present appellant that he was a *bona fide* purchaser without notice of the claim of the plaintiff, it should be noted that the said defence of *bona fide* purchase is not available for a transfer during the pendency of the suit. Defendant no.1, in her cross-examination, admitted that before entering into the contract with the present appellant, she has intimated him about pendency of the suit. Whether said admission would be binding on the present appellant is not required to be gone into in the present case as, the transfer is made during the pendency of the suit. Besides this, it should be

noted that present appellant is an Orthopedic Surgeon who, admittedly, was operating his hospital in the area. What is transpired from the evidence from his side is that he had asked his advocate to take search regarding the title of the property in the office of the Sub-Registrar, but he did not issue any public notice in the newspaper being circulated in the Ahmednagar Municipal Corporation limits.

21] Mr.Hon submitted that the issue of *lis-pendens* was not framed. However, no issue of *lis-pendens* was required to be framed as the transaction between the appellant/defendant no.2 and defendant no.1 took place after filing of the suit by the plaintiff and the appellant himself came with a case that during pendency of the suit, he has purchased the suit property from defendant no.1.

22] Having considered all these facts, in my view, present appellant/defendant no.2 would also be bound by the contract entered into between the plaintiff and defendant no.1.

23] Hence, the following order :-

. The appeal is hereby dismissed without any order as to costs.

[M.T. JOSHI, J.]