

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.402 OF 1993

Jitendra Goverdhandas Tanna

.. Appellant

V/s.

Smt. Sulochana P. Nagarkar & Anr.

.. Respondents

.....

Mr. Nachiket V. Khaladkar, Advocate for the Appellant.

Mr. G. S. Hiranandani h/f. Mr. C. G. Gavnekar, Advocate for the Respondents.

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CORAM : R.K. DESHPANDE, J.

DATED : JULY 30, 2015.

P.C.

The appellant is the original plaintiff and had filed Regular Civil Suit No.33 of 1982, for specific performance of contract dated 12th June, 1981, only against the defendant no.1 seeking the relief that the defendant no.1 be directed to execute the sale – deed in respect of half portion of the suit property in favour of the plaintiff and to deliver possession thereof. The trial Court decreed the suit on 30th April, 1986 and the operative part of the order is reproduced below:

“ The suit of the plaintiff is hereby decreed with costs.

The defendant Nos.1 and 2 are hereby directed to hand over the possession of the suit land to the plaintiff.

The plaintiff is also entitled to megne profit under Overrule 12 of the Civil Procedure Code.

The Court Commissioner is also appointed to obtain the permission from the Prant Officer, Panvel.

The defendants be bear their own costs.

Decree be drawn accordingly.

Pronounced in open Court.”

2 The Lower Appellate Court by its judgment and order dated 12th March, 1992, partly allowed the Civil Appeal No.69 of 1987. The operative portion of the order passed by the Lower Appellate Court is reproduced below:

“ Appeal is allowed.

Judgment and decree passed by the lower Court in R.C.S. No. 33/82 dated 30th April, 1986, is hereby set aside, with following modification.

Defendant No.2 to hand over the possession of the suit property i.e. of her half share to the plaintiff after effecting the partition in between herself and defendant No. 1 i.e. present appellant.

Rest of the relief granted by the lower Court is set aside.

Parties to bear their own costs.”

The plaintiff is before this Court challenging the decision of the Lower Appellate Court.

3 Both the Courts below are concurrent in holding that the defendant nos.1 and 2 were the joint owners of the suit property and had executed an agreement to sale dated 12th June, 1981 at Exhibit – 31 in favour of the plaintiff to sell the suit property for total consideration of Rs. 22,000/-. The Courts have also recorded the finding that an amount of Rs. 4,000/- was paid as earnest money, at the time of execution of the agreement and in addition to it, an amount of Rs. 5,000/- was also paid. The balance amount remained of Rs. 13,000/- to be paid. On 28th September, 1981, the defendant no.2

executed a registered sale-deed in respect of the entire property in favour of the plaintiff and it is marked as Exhibit – 32. It contains a clause that the balance amount of Rs. 13,000/- was paid to the defendant no.2. Thus, according to the plaintiff, entire consideration for purchasing the suit property was paid. But, the defendant no. 1 has refused to execute the sale – deed and to deliver the possession of half portion of the property.

4 The only question before the Courts below was whether the plaintiff has proved an agreement to sale dated 9th March, 1981 said to have been executed jointly by the defendant nos.1 and 2 in favour of the plaintiff. Undisputedly, the agreement was registered. Both the Courts below are concurrent in holding that the agreement has been proved and marked as Exhibit – 31. The defendant no. 2 has executed the registered sale-deed dated 12th June, 1981 at Exhibit – 30 in respect of her share in the suit property, and she has not appeared to defend the matter before the Courts below. There is no finding recorded by both the Courts below that the defendant no.1 has failed to establish her stand that the agreement dated 12th June, 1981 was obtained from her by way of playing fraud.

5 The trial Court did not passed a decree for specific performance of contract, but only passed a decree for delivery of possession against defendant nos. 1 and 2, though, no decree was claimed against the defendant no.2. The Lower Appellate Court has modified the decree passed by the trial Court, by setting aside the claim for specific performance of contract against the defendant no.1, by rejecting the claim, but directing the defendant no.2 to hand over the possession of the suit property in respect of her half share to the plaintiff after effecting the partition.

6 In background of the aforesaid findings recorded by the Courts below and the reliefs granted, following substantial questions of law arises for determination of this Court.

- (i) *Whether the relief granted by the Courts below are in conformity with the reliefs claimed in the suit by the plaintiff?*
- (ii) *Whether the Courts below were justified in refusing to grant decree of specific performance of contract against the defendant no.1?*

7 The matter is heard finally by consent of the learned counsel appearing for the parties, who do not seek further time to address this Court on the substantial question of law.

8 In the plaint, the claim was for specific performance of contract only against the defendant no.1 along with the relief of possession to the extent of half portion of the suit property in his possession as the owner of the suit property. The trial Court has committed an error of law in refusing to grant the decree for specific performance of contract. The trial Court ought to have passed a decree against the defendant no.1 for specific performance of contract. Undisputedly, the paid of the balance amount of Rs. 13,000/- was not paid to the defendant no.1. There is a finding that agreement is proved. There is no finding that plaintiff has failed to establish readiness and willingness to perform his part of contract. The plaintiff will have therefore to pay an amount of Rs.7,000/- to the defendant no.1 for getting the sale - deed executed. The Lower Appellate Court has ignored the relief claimed in the plaint and without applying its mind modified the decree passed by the trial Court. The reliefs granted by the

Courts below are not in conformity with the reliefs claimed in the suit. The Courts below committed an error of law in not passing a decree for specific performance of contract, as claimed. The questions of law are answered accordingly. In view of this, the decree passed by both the Courts below will have to be modified.

9 In the result, the Second Appeal is allowed and the decree passed by both the Courts below is modified as under:

- (i) The Regular Civil Suit No.33 of 1982 filed by the plaintiff is decreed directing the defendant no.1 to execute a sale - deed in respect of half portion of the suit property i.e. Survey No.10, Hissa No.3A, situated at Shedavali, Sheelphata, Taluka Khalapur, District Raigad, in favour of the plaintiff and to hand over its possession;
- (ii) The plaintiff to deposit the balance consideration of Rs.7,000/- along with interest @ 8% per annum from the date of the decree passed by the trial Court dated 30th April, 1986, till the date of deposit of an amount within a

period of three months from today which the defendant no.1 shall be permitted to be withdrawn;

- (iii) If the defendant no. 1 fails to execute the sale - deed within a period of one month from the date of deposit of the amount in trial Court, the plaintiff shall be at liberty to get the sale - deed executed in respect of this through Court and shall obtain possession thereof from the Court.

No costs.

JUDGE