

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 131 OF 2014
ALONGWITH
CIVIL APPLICATION NO. 339 OF 2014
IN
SECOND APPEAL NO. 131 OF 2014

Rajendra Bhiva Khane

.....Appellant

V/s.

Shri. Ramu Hansraj Yadav
since deceased through his
legal heirs and Ors.

.....Respondents

* * * *

Mr. Sandesh Patil, Advocate for the appellant

CORAM :- SMT. R.P. SONDURBALDOTA, J

17th MARCH, 2015.

P.C. :

1). This Second Appeal is directed against the judgment and order dated 23rd August, 2013 passed by the District Court, Thane on Civil Appeal No. 117 of 2009 filed by the respondents. By the impugned judgment and order, the District Court has set aside the judgment and decree dated 13th February, 2009 passed by the trial Court in Special Civil Suit No. 106 of 1998 and dismissed the suit.

2). Briefly stated, the facts giving rise to the present

proceedings are as follows :-

. The appellant is the owner of the Municipal House No. 231, New Kaneri, Bhiwandi. He agreed to sell one shop admeasuring 11 x 11 ft in the building to one, Ramu Hansraj Yadav by the agreement of sale dated 15th February, 1997 for the total consideration of Rs.1,80,000/-. At the time of execution of the agreement, Ramu paid an amount of Rs.1,40,000/- towards part consideration for the shop and the appellant handed over possession to him on the same day. It is the case of the appellant that, the balance amount of Rs.40,000/- was to be paid by Ramu Yadav within a period of 4 months from execution of the agreement i.e. by the month of June, 1997 and that if the amount remained unpaid within the period, the appellant will have a right to take back possession. The appellant alleges that after execution of the agreement and being put in possession, Ramu Yadav started avoiding to fulfill the terms of the agreement. Therefore, the appellant cancelled the agreement for sale and demanded possession of the shop premises. He also forfeited the part consideration paid to him.

3). Ramu Yadav contested the suit contending that out of the balance amount of Rs.40,000/- he had made payment of Rs.30,000/- in the presence of two witnesses to the appellant and the balance amount of Rs.10,000/- was to be paid at the time of execution and

registration of the sale-deed and therefore except for Rs.10,000/- nothing was due and payable to the appellant.

4). During the pendency of the suit, Ramu died and the respondents were brought on record as his heirs. The trial Court rejected the defence of the respondents observing that the respondents had failed to examine the witnesses in whose presence Ramu had paid Rs.30,000/- to the appellant. It further observed that, even if the payment of Rs.30,000/- by Ramu to the appellant was accepted, the balance amount of Rs.10,000/- remained unpaid till date and therefore the respondent had committed breach of the agreement of sale. With these reasons, the trial Court had decreed the suit and directed the respondents to handover possession of the shop premises to the appellant.

5). Being aggrieved by the decree passed by the trial Court, the respondents preferred Regular Civil Appeal No. 117 of 2009 to the District Court, Thane. The District Court noted that the appellant had, in his cross-examination admitted that, he was, from time to time, paid the total amount of Rs.30,000/- after the respondents were put in possession of the shop premises. It was sought to be argued before the District Court that, time being the essence of the contract of sale of the shop premises, failure on the part of the respondents in paying the

balance amount of Rs.40,000/- within 4 months from the date of the agreement amounted to breach of the contract. Therefore, the appellant was entitled to cancel the agreement and seek possession from the respondents. The District Court held that, it is well settled position of law that, in the case of specific performance of contract relating to immovable property, time is not the essence of the contract though specific period is mentioned in the agreement, unless, circumstances special to a particular case warrants the same. The appellant herein had neither pleaded nor proved the circumstances which would make time as essence of the contract and how he would suffer loss, if any, for non-compliance within the agreed time. Therefore, time was not the essence of contract of sale of the shop premises to the respondents.

6). The District Court, then considered the readiness and willingness of both the sides in performing their part of the contract. As regards the respondents, it noted that they had already paid to the appellant nearly 77% of the consideration amount at the time of execution of the sale itself. Further, they had deposited a sum of Rs.60,000/- in the Court pursuant to the Court's order dated 9th April, 2010. This indicated the intention of the respondents in respect of their readiness and willingness to perform their part of the contract.

On the basis of the evidence on record, the District Court opined that, there was no evidence brought before the Court by the appellant to show his readiness and willingness in performing his part of the contract. He had directly issued the notice for cancellation of the agreement of sale.

7). The District Court considered further circumstances for exercise of its discretion in the matter of cancellation of the agreement.

The circumstances noted at para-17 reads as follows :-

“ Admittedly, the possession of the suit property is with defendant. The defendant is poor person earning his livelihood by selling peanuts & channa. He invested his hard earned money for purchasing a suit shop block/gala parting with considerable part payment for suit shop. Defendant died during pendency of suit & survived by his wife & five children. Plaintiff has not proved that the defendant had violated the term of agreement intentionally and he was not ready and willing to perform his part of contract. In the present case, the another commercial block of the plaintiff was adjacent to the suit shop block/gala, therefore, they must be always in contact with each other and the contention of defendant that from time to time they requested to take the remaining amount and get the sale-deed executed, is seem to be quite natural. The remaining balance consideration is very less in comparison to the part payment made (earnest amount paid) to the plaintiff. In such circumstances, the principle of equity lies in favour of defendant.”

. It held that, in the circumstances the hardship would be more to the respondents in case of cancellation of the agreement of sale. Further, the respondent's possession is protected under Section 53A of

the Transfer of Property Act. The inferences drawn by the District Court are completely supported by the material on record as also the position in law relating to cancellation of the agreement of sale. Therefore, the same cannot be interfered with. The Second Appeal is therefore dismissed.

8). With the dismissal of the Second Appeal, the Civil Application does not survive. The same is accordingly disposed off.

(SMT. R.P. SONDURBALDOTA, J)