

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Second Appeal No. 328 of 2015
With
Civil Application No.7991 of 2015
With
Civil Application No.14212 of 2015**

Ashfaque Khan s/o Hameed Khan. .. **Appellant.**

Versus

M/s. Zeneth Constructions & Others. .. **Respondents.**

Shri. S.S. Kazi, Advocate, for appellant.

Shri. Narendra V. Mande, Advocate, for respondent Nos.1
& 2.

Shri. Rohit S. Sarvadnya, Advocate, for respondent No.3.

CORAM: T.V. NALAWADE, J.

DATE : 28 JULY 2016

ORDER:

1) The appeal is filed to challenge the judgment and decree of Special Civil Suit No.16/2006 which was pending in the Court of Civil Judge, Senior Division, Aurangabad and also to challenge the judgment and decree of Regular Civil Appeal No.220/2012 which was pending in the District Court Aurangabad. Both the sides are heard.

2) The suit was filed by respondent No.3-Mohd. Yunus for relief of specific performance of contract of sale and also for relief of perpetual injunction. The property involved is CTS Nos.6608 and 6609 situated in Rohilla Galli, Aurangabad. The area of these properties is 233.3 square meters and 228.0 square meters respectively. It is contended that the properties were owned by Sabera Begum, Abdulla Khan and others. It is the case of the plaintiff that the owners had entered into agreement with defendant No.1 and under the agreement, defendant No.1, construction firm, was authorised to develop the land and to sell the construction made on the land.

3) Plaintiff is son of defendant No.2. Defendant Nos.2 and 3 were partners of defendant No.1 - firm. It is contended that defendants entered agreement with plaintiff to sell the suit property for consideration of Rs.3.65 lakh and agreement was executed on 26-12-2005. It is contended that on the date of agreement amount of Rs.50,000/- was paid by the plaintiff as earnest money by cheque. It is contended that on the date of agreement the plaintiff was put in possession of the suit property. It is

contended that remaining amount was to be paid before 5-5-2006 and after receiving the consideration, sale deed was to be executed in favour of the plaintiff by defendants.

4) It is the case of the plaintiff that he had approached the defendants in the first week of January 2006 and he had requested them to execute the sale deed after accepting the remaining consideration but they refused to perform their part of the agreement. In view of this, relief of specific performance of agreement was claimed in the suit.

5) Defendant No.3 contested the suit by filing written statement. He admitted that there was partnership business of construction of defendant No.1 and defendant Nos.2 and 3 were the partners on record. He contended that defendant No.2 had made document of agreement in favour of son, plaintiff illegally and without taking consent of defendant No.3. It is contended that this agreement is against the interests of the defendants. It is contended that no accounts were maintained and the value, the consideration shown is much less.

6) It is the case of defendant No.3 that plaintiff is in Government service, he is working as Deputy Engineer in Public Works Division of the Government and he had taken initiative to form the firm under the name of M/s Zenith Construction viz. defendant No.1. It is contended that defendant No.2, father of the plaintiff, was made partner in the firm but it is the plaintiff who was managing the affairs of the partnership firm and so aforesaid agreement was created only for the benefit of the plaintiff. He denied that payment was made under the agreement and possession was given to the plaintiff. It is also contended that Sabera Begum and others, previous owners, are necessary parties to the suit.

7) Defendant No.2 appeared in the suit and he admitted the execution of the agreement and receipt of Rs.50,000/- as earnest money. Some allegations are made regarding conduct of respondent No.3 but those allegations need not be considered.

8) Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. The Courts below

have held that there was agreement between the firm and the plaintiff and earnest money was accepted for the firm by defendant No.2 and the plaintiff was entitled to get the relief of specific performance of contract of sale.

9) Execution of the agreement is not disputed and it is also not disputed that authority was given to defendant No.1 by the owners to sell the property and defendant Nos.2 and 3 were partners of defendant No.1 firm. The clauses of the partnership agreement indicating their rights and powers need to be considered. The partnership agreement is at Exhibit 71 and clause No.8 shows that one of the two partners was entitled to enter into contract and even to sell the property by putting his signature for other partners and for partnership firm. Thus, there was the power with defendant No.2 to enter into such agreement of sale.

10) At Exhibit 47 there is disputed agreement. This agreement shows that for the partnership firm defendant No.2 had agreed to sell the suit property to the plaintiff for total consideration of Rs.3.65 lakh. Installments, which

were to be paid on particular dates, were mentioned and it can be said that post dated cheques were given of those amounts. Amount of Rs.50,000/- was paid on the date of agreement by cheque. Evidence is given that this cheque was encashed in the account of the firm. The document mentions that after making payment, sale deed was to be executed and the last installment was to be paid on 5-5-2006. The suit was filed on 12-1-2006 by contending that the defendants had refused to perform their part of contract and there are pleadings of aforesaid nature in the written statement filed by defendant No.3. Thus, there was cause of action for the suit.

11) Learned counsel for the appellant, original defendant No.3, argued much on one circumstance like the agreement at Exhibit 47 was not written on stamp paper of proper value and it was not registered. It was submitted that some objection in that regard was also taken in the written statement but the document was exhibited during evidence. It was submitted that the Court ought to have impounded the document as proper stamp duty was not paid but such step was not taken. On this

point reliance is placed on one case reported as **2009(1) Mh.L.J. 335 (Jyoti Vasantrao Butle v. Varsha Aniruddha Bansod)**. In this case this Court has laid down that whenever there is objection against giving exhibit to the document such objection needs to be decided first by the Court. There is no dispute over this proposition. Record shows that when Court was giving exhibit no objection was taken. Further, contents of Exhibit 47 show that possession was not handed over under this document and this document was executed simply as agreement of sale on the general stamp of Rs.100/- denomination. In view of this circumstance, it cannot be said that the document ought to have been registered. In the pleadings it is contended that possession was already given but due to such pleading inference cannot be drawn that under this document possession was given and it is liable to be impounded. As possession was not given there was no necessity of registration of the document as it was simple agreement of sale.

12) In view of the aforesaid documentary evidence this Court holds that the Courts below have not committed

any error in holding that there was agreement of sale and the plaintiff is entitled to get relief of specific performance of contract. Only because his father was partner in the partnership firm, inference is not possible that the action of the father was against the interest of the partnership firm. No evidence is given to show that the agreement was made for value which was much less than the market value. Further the owners of the property who were to be benefited are not examined by the defendant No.3. They could have thrown light on this case of the defendant No.3. No substantial question of law as such is involved in the matter. In the result, the appeal stands dismissed. Civil Applications are disposed of.

Sd/-
(T.V. NALAWADE, J.)

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