

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

SECOND APPEAL NO. 657 OF 2013

Gangaram s/o Bhagwandas Kaushaley **APPELLANT**

V E R S U S

Sou. Jyoti w/o Kishor Shitole & Anr. **RESPONDENTS**

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Mr. V.P.Latange, Advocate for Appellant.

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CORAM : T.V.NALAWADE, J.

DATE : 10th MARCH, 2016

ORDER :-

1. The Appeal is filed by the defendant of R.C.S. No. 572/2005 which was pending in the Court of Civil Judge [Sr. Division], Aurangabad. The Suit filed by the present respondent for relief of specific performance of contract is decreed in her favour by the trial Court and its decision is confirmed by the first appellate Court in the Judgment and decree of R.C.A. No. 83/2008. Heard learned counsel for the appellant.

2. Suit was filed in respect of one plot which is given No. 49 and it is part and parcel of G.No. 28 situated at

Etkheda, Tahsil and district Aurangabad. Area of the plot is 279.74 Sq.Mtrs. Defendant No. 1 is the owner of the land and he was selling the plots by making development. Defendant No. 2 was appointed by defendant No. 1 as General Power of Attorney in connection with this business.

3. It is the case of the plaintiff that she knew defendant No. 2 and defendant No. 2 advised her to invest money by purchasing aforesaid plot. It is contended that the irrevocable power of attorney given to defendant No. 2 by defendant No. 1 was shown to her and due to the faith on defendant No. 2, she agreed to purchase the plot for the consideration of ₹ 60,000/-[Rupees Sixty Thousand] on 31/12/1996. It is contended that, on that day, agreement was executed which was registered after accepting the consideration of ₹ 20,000/-[Rupees Twenty Thousand]. It is contended that it was agreed to complete the formalities and the defendant No. 1 was to obtain N.A. permission, etc. and then the sale deed was to be executed in favour of the plaintiff.

4. It is the case of the plaintiff that defendant No. 2 then accepted ₹ 40,000/-, the remaining amount from her and handed over the possession of the plot to her on 08/10/2002. It is contended that Taba Pawti was executed in her favour by defendant No. 1 through defendant No. 2. It is her case that she has fixed name board on the said plot and she has done wire fencing around this plot and she has made construction of shed for residence of her watchman.

5. It is the case of the plaintiff that even when she had paid entire amount of consideration, defendant No. 1 did not execute sale deed and he did not inform her about completion of the formalities like obtaining N.A. order, etc. It is contended that ultimately she gave legal notice on 06/07/2005 and requested the defendant to perform his part of the contract. It is contended that defendant No. 1 gave false reply and she felt that there was collusion between defendant Nos. 1 and 2. It is her case that defendant Nos. 1 and 2 then tried to interfere in her possession over the suit property and so she was required to file the Suit. She had prayed for relief of specific performance of aforesaid contract and she had also prayed for relief of injunction to protect the possession.

6. Defendant No. 1 appeared in the proceeding and filed Written Statement. Defendant No. 2 did not appear in the proceeding. Defendant No. 1 admitted that he had executed agreement and on the date of agreement he had received consideration of ₹ 20,000/-. He contended that as per the agreement, time was essence of contract and plaintiff was to pay the remaining amount of ₹ 40,000/- within six months from the date of the agreement. He contended that the plaintiff did not pay the remaining amount within this time and so agreement needs to be treated as cancelled. He contended that he is still in possession of the plot and the wire fencing appearing on the plot is done by him. He has contended that plaintiff in collusion with defendant No. 2 has prepared false record of receipt of remaining consideration and Taba pawti. He contended that General Power of

Attorney given in favour of defendant No. 2 was withdrawn by him as he was not acting for protecting the interest of defendant No. 1. Defendant No. 1 prayed for dismissal of the Suit.

7. On the basis of the aforesaid pleadings, issues were framed by the trial Court. Defendant No. 1 admitted the execution of agreement dated 31/12/1996 and also admitted that he had accepted the consideration of ₹ 20,000/-. In view of this admission, the contents of the agreement are read by the Courts below. The contents show that N.A. permission was to be obtained by defendant No. 1, other formalities were to be completed and then the sale deed was to be executed. Though time of six months was fixed, during this period the formalities were to be completed by defendant No. 1. In view of these circumstances, it was the duty of defendant No. 1 to take steps and to inform the plaintiff that he was ready with the necessary permissions and the sale deed could be executed. No such step was taken by defendant No. 1. Only vague contention in the Written Statement that the agreement was cancelled as the consideration was not paid within six months, is not sufficient in this regard. When there are reciprocal promises, it was not necessary for the plaintiff to take steps unless and until the part which was expected to be played by defendant No. 2 was played by him.

8. Defendant No. 1 has taken the defence that he had cancelled and withdrawn the General Power of Attorney, but there is no convincing evidence to prove that it was

withdrawn. On the other hand, the contents of the General Power of Attorney [Exh.65] show that authority was given to accept the money on behalf of defendant No. 1 and issue receipt, etc. Evidence is given by the plaintiff that she paid remaining amount to defendant No. 2, he gave receipt and also gave the possession. Thus, entire amount of consideration was paid by the plaintiff and the only thing which was to be done like execution of the sale deed was to be done by the defendants. The evidence of defendant No. 1 shows that there was power given to defendant No. 2 to hand over possession also.

9. Learned counsel for appellant/original defendant No. 1 placed reliance on the case reported in *AIR 1996 Supreme Court 910 [Mohanlal (deceased) through his L.Rs. Kachru & Ors. Vs. Mira Abdul Gaffar & Anr.]*. This case was altogether on different point. It is true that readiness and willingness needs to be proved by the plaintiff to get the relief of specific performance of contract. On the basis of aforesaid material, the Courts below have held that the plaintiff was ready and willing to perform her part of contract and as she had given entire consideration to defendant Nos. 1 and 2, it was necessary for them to execute the sale deed. The finding is concurrent. The Courts below also held that it is a fit case where discretion needs to be exercised for specific relief claimed by the plaintiff. Thus, no substantial question of law as such is involved in the matter.

10. In the result, Second Appeal stands dismissed.

11. In view of dismissal of Second Appeal, C.A. No. 11684 of 2013 stands disposed of.

[T.V.NALAWADE, J.]

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