

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

904 SECOND APPEAL NO. 463 OF 2016
WITH CA/9615/2016 IN SA/463/2016

RAMBHAU MAROTRAO DHUMAL
VERSUS
RUKHMINIBAI SHESHRAO DHUMAL AND ANR

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Advocate for Appellant : Bagal Vishal A.

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CORAM : T.V. NALAWADE, J.
DATED : 8th July, 2016.

ORDER :

1. The appeal is filed to challenge the judgment and decree of Special Civil Suit No. 90/2006, which was pending in the Court of Civil Judge, Senior Division, Jalna and also the judgment and decree of Regular Civil Appeal No. 105/2012, which was pending in the Court of Ad-hoc District Judge-3, Jalna. The suit was filed for specific performance of contract of sale made by original defendant No. 1 - Shivaji in favour of plaintiff. As some portion of the property under the agreement was already sold to defendant No. 2 - Rambhau, present appellant, he was made party to the suit. Relief of specific performance is given by the Trial Court and it is confirmed by the First Appellate Court.

2. Heard the learned counsel for appellant, original

defendant No. 2. It is not disputed that Shivaji, original owner was nephew of both plaintiff and defendant No. 2. He was the owner of entire area of land Gat No. 154, admeasuring 1 H. 83 R. It is the case of plaintiff that Shivaji had agreed to sell the property for consideration of Rs. 2.18 lakh to her and on 24.7.2006, the date of agreement, earnest money of Rs. 40,000/- was given to Shivaji. It is contended that as per the agreement, the sale deed was to be executed on 1.10.2006 and on that date, remaining amount was to be paid. It is the case of plaintiff that she was ready and willing to perform her part of contract and she had requested defendant No. 1 by visiting his house to perform his part of contract on 30.9.2006. It is her contention that defendant No. 1 had given excuse that there was Dasara festival and he would execute the sale deed after Dasara festival. It is her case that she then realized that on 3.10.2006 defendant No. 1 sold 2 Acre portion to defendant No. 2 and the meager consideration of Rs. one lakh was shown. The suit came to be filed on 8.11.2006.

3. Defendant Nos. 1 and 2 filed joint written statement and they contested the suit. They admitted that defendant No. 1 had taken the amount of Rs. 40,000/- from the plaintiff, but they contended that it was loan transaction and the document dated

24.7.2006 was executed by way of security to the loan. It is their case that only to repay the loan taken from the plaintiff, 81 R. portion was sold by defendant No. 1 to defendant No. 2 and then the amount of Rs. 40,000/- was returned to plaintiff. It is contended that the document of agreement remained with plaintiff and she is misusing the document.

4. On the basis of aforesaid pleadings issues were framed. Both the sides gave evidence. Submission was made that during pendency of the proceeding, defendant No. 1 sold the remaining portion to plaintiff under registered sale deed. Plaintiff gave evidence as per the aforesaid contentions made in the pleadings and the document of agreement was exhibited by the Trial Court as the execution is not disputed.

5. Defendant No. 1 had initially given evidence against the plaintiff and his evidence shows that there was nothing with him to show that the real transaction was of loan. The circumstance that subsequently, he did sell the property needs to be used against the defendant No. 1.

6. No defence was taken by defendant No. 2 that he is bonafide purchaser without notice. On the contrary, due to

relationship of defendant No. 2 with defendant No. 1 and plaintiff, inference is drawn that defendant No.2 had knowledge about the transaction between plaintiff and defendant No. 1. He filed joint written statement with defendant No. 1 and due to this circumstance, there was not much scope to him to contend and prove that he was bonafide purchaser.

7. The Courts below have considered one circumstance that on 1.10.2006, the date on which sale deed was to be executed, it was Sunday. On 2.10.2006 the office of Sub-Registrar was closed due to Dasara festival and so, the sale deed could have been executed on 3.10.2006. However, the sale deed was not executed in favour of plaintiff and it was executed in favour of defendant No. 2. Thus, there was no intention of defendant No. 1 to execute the sale deed in favour of plaintiff and defence that time was essence of contract is not open to defendant No. 1. In view of these circumstances, the plaintiff is believed by the Courts below that she had approached defendant No. 1 on 30.9.2006 and she had requested him to execute the sale deed. It is not the case of defendants that there was no money with plaintiff, she was not ready with the amount for completing the transaction. In view of these circumstances, there was not much burden on plaintiff to prove the readiness

and willingness. There was no agreement executed in favour of defendant No. 2 by defendant No. 1 prior to the sale transaction and no notice was published by him to ascertain that no other person had right to purchase the property. In addition to that, there were aforesaid circumstances against defendant No. 2. The suit was also immediately filed. All these circumstances are considered by the Courts below and the findings of the Courts below are on questions of facts. No other finding was possible. So, this Court holds that no substantial question of law as such is involved in the matter.

8. In the result, the appeal stands dismissed. Civil Application is disposed of. The learned counsel for appellant requested for granting stay to protect possession. The said request is refused.

[T.V. NALAWADE, J.]

ssc/