

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and Registrar's orders.	Notes, of Court's orders or	Office Coram, orders or	Court's or Judge's orders.
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SECOND APPEAL NO. 716 OF 2015
WITH CA/15995/2015 IN SA/716/2015

BALAJI VENKATESH KOTTAWAR

VERSUS

HABIBUDDIN RAHIMUDDIN

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Advocate for Appellant : Mr. Katneshwarkar P. R.
Advocate for Respondent: Mr. Gapat Pramod B.

CORAM: T. V. NALAWADE, J.
DATED: 7th MARCH, 2016.

PER COURT:

1. The appeal is filed against judgment and decree of Regular Civil Appeal No.55 of 2013 which was pending before the District Judge No.7, Aurangabad. This appeal was filed by present Appellant against the judgment and decree of Special Civil Suit No.584 of 2011 which was pending before Civil Judge, Senior Division, Aurangabad. The suit filed by present Appellant for specific performance of agreement dated 28th November, 2002 is dismissed by

the trial Court but alternate relief of refund of earnest money was given and this decision is confirmed by the first Appellate Court.

2. The suit was filed in respect of open plot having area of 154 Sq.Mtrs., situated at Shahanoorwadi, Aurangabad. In the suit, boundaries of this plot are given and it is contended by the plaintiff that the defendant had agreed to sell this plot to plaintiff and the agreement was reduced into writing on 28th November, 2002. It is contended that the agreed consideration was Rs.5,64,000/- and the amount of Rs.40,000/- was paid on 28th November, 2002 as earnest money. It is contended that on 29th November, 2002 the amount of Rs.1 Lakh was to be paid and the balance amount was to be paid on 1st March, 2003 when the sale deed was to be executed but when the plaintiff verified the documents, he noticed that the plot was shown as a portion of Nala, brook by the Municipal Corporation and so the Municipal Corporation would have taken objection for making use of this plot for construction etc. It is the case of the plaintiff that on subsequent dates he paid some consideration amount but the defendant failed to show to the plaintiff that the plot

was not portion of Nala and no authority would take objection for the use of the plot.

3. It is the case of the plaintiff that when he learnt that the defendant was about to sell the plot to others, he gave public notice on 28th December, 2005 in daily newspaper Lokmat and informed the public about his rights to purchase the plot. It is contended that another notice was published in the newspaper on 19th May, 2008. It is contended that he had called upon the defendant to execute the sale deed but the defendant did not execute sale deed till 19th May, 2008.

4. It is the case of plaintiff that he approached MIDC CIDCO Police Station and gave report against the defendant on 8th June, 2008 and on that basis the crime for offence punishable under sections 420 etc. of Indian Penal Code came to be registered against the defendant. It is contended that he gave notice also through Advocate on 4th August, 2008 to ask the defendant to execute the sale deed after removing the objections of the municipal Corporation. It is contended that defendant did not reply the notice but ultimately on 13th August, 2008 the matter was compromised between the plaintiff and defendant

and defendant executed another agreement under the title "settlement" and agreed to sell the plot by accepting amount of Rs.3 Lakh more. It is his contention that already amount of Rs.1,46,000/- was paid. It is contended that due to the settlement, the criminal case filed by the appellant came to be disposed of as compounded.

5. It is the case of plaintiff that, as per the settlement, defendant applied for permission for use of the plot for non-agriculture purpose and he got the permission on 9th December, 2008. It is contended that the amount, required for getting the permission, viz. Rs.3,991/- was paid by plaintiff, as per the agreement. It is contended that, then steps were taken for measurement of plot and necessary charges like Rs.2,250/- were given by plaintiff to defendant.

6. It is the case of plaintiff that even after taking of aforesaid steps by him, defendant avoided to execute the sale deed and so one more notice dated 5th June, 2009 was given by him to the defendant. It is contended that the defendant replied this notice through Advocate Mr. Malani on 20th June, 2009. It is contended by the plaintiff that he again gave public notice dated 20th October, 2010 as defendant was avoiding to execute the sale deed. It is

contended that one more public notice dated 16th August, 2011 through Advocate was given in newspaper to prevent people from purchasing the plot from defendant. It is contended that plaintiff gave notice dated 16th August, 2011 and again requested the defendant to take steps like taking no objection of Corporation to sell the plot to the plaintiff. It is contended that the defendant avoided to take steps and so the cause of action took place to file the suit. Relief was claimed for giving direction to the defendant to execute the sale deed by accepting balance amount Rs.3 Lakh and for giving direction to the defendant to take steps for removing objections of aforesaid nature.

7. Defendant filed written statement at Exhibit-12 and he contested the matter. It is the case of the defendant that only after verification of title of the defendant, plaintiff had agreed to purchase the suit plot under the first agreement dated 28th November, 2002. It is contended that the sale deed was to be executed on or before 1st March, 2003 and payment of entire consideration was to be made prior to that date. It is contended that plaintiff was not having money to complete the transaction. It is

contended that the time was essence of contract but plaintiff failed to make the payment of money.

8. The defendant has denied that there was objection of municipal Corporation and the plot was shown as a portion of Nala. It is contended that when defendant was in need of money, plaintiff did not make the payment and he virtually prevented defendant from alienating the property by getting agreement executed on 28th November, 2002. It is contended that the tactics of plaintiff of publishing notice in newspaper were only to prevent the defendant from selling property, to harass him and to pressurise him. It is contended that no steps were taken by plaintiff to make the payment before 1st March, 2003 and so there was no reason for plaintiff to approach any authority, including police. It is contended that even when the dispute was of civil nature, plaintiff approached police, used his political influence and made police to file false case against the defendant for the aforesaid transaction. It is contended by the defendant that he is a simpleton poor person and he was harassed by plaintiff by using his influence over authorities and by taking aforesaid steps. It is contended that by pressurising him another document

was got executed by plaintiff and as there was a police case pending, the defendant signed on that compromise document. It is contended that the circumstance that the consideration which was agreed in the year 2002 was reduced by amount of more than Rs.1 Lakh is sufficient to infer that plaintiff used pressure tactics and compelled the defendant to arrive at such settlement. It is contended that the price of the suit plot had increased 4 to 5 times in the year 2008 but the plaintiff reduced the price by amount of more than Rs.1 Lakh by taking aforesaid steps.

9. It is the case of defendant that inspite of the aforesaid circumstances, defendant had given an opportunity by sending notice to the plaintiff to make the payment and get the sale deed executed but the plaintiff did not make the payment. It is contended that the plaintiff has created obstacles in the way of defendant by creating litigation in respect of the property and his actions are malafide. It is contended that the suit is time barred and plaintiff is not entitled even to get back the earnest money.

10. The trial Court framed issues which included the issue of readiness and willingness of plaintiff. To prove the

case, plaintiff examined himself and he produced the documents like the first agreement dated 28th November, 2002, the second document like receipt dated 11th February, 2003 and the so called compromise document dated 13th August, 2008. He also produced copy of order made by Criminal Court by which the Criminal case RCC No.1627 of 2008 filed by State for offence punishable under sections 420 etc. of Indian Penal Code was compounded. Copy of the order made by authority, of giving N.A. permission and copy of Challan in respect of the charges deposited, are produced at Exhibit Nos.26 and 27. Copy of application made for measurement, dated 2nd February, 2009 by the plaintiff is produced. Reply given by defendant through Advocate Mr. Malani dated 20th June, 2009 is produced at Exhibit-30. In the reply, opportunity was given to the plaintiff to get executed the sale deed by making the payment of consideration amount. At Exhibit-31 the counter reply given by plaintiff through Advocate to Exhibit-30 is produced and it shows that unless and until the conditions mentioned in the compromise document were complied with, plaintiff was not ready to complete the transaction. Then, the copies of notices sent for publishing

in newspapers are produced and one more legal notice sent to defendant through Advocate dated 16th August, 2011 is produced. There is sale deed executed in favour of defendant in the year 2001 in respect of the suit property at Exhibit-37. The map got prepared by defendant of the suit property to show the location of plot in the year 2003 (24th March, 2003) is produced at Exhibit-38.

11. The defendant has examined himself to give evidence in rebuttal.

12. The trial Court refused the relief of specific performance of the contract by taking into consideration the following circumstances:

- (i) that, the agreement was signed by the parties on 28th November, 2002 but after 8th April, 2003 no steps were taken by the plaintiff to see that the sale deed was executed in his favour.
- (ii) The initial amount of consideration was Rs.5,64,000/- and the entire amount was to be paid prior to 1st March, 2003 but till 8th April, 2003 the total amount of Rs.1,46,000/- only was paid.
- (iii) The measurement of the property was made

on 24th March, 2003 itself and the map of the measurement was available on 24th March, 2003 and it showed that the plot was not part of Nala. In the year 2001 sale deed of suit property was registered.

- (iv) Though plaintiff took the defence that in development plan the plot was shown as a part of Nala, copy of such plan was not produced by the plaintiff.
- (v) Though the time was not the essence of contract, as after 1st March, 2003 some consideration was accepted by defendant and even in the notice dated 20th June, 2009 opportunity was given by the defendant to the plaintiff to get executed the sale deed, the plaintiff did not take concrete steps for making payment of the remaining consideration.
- (vi) In the initial agreement there was no condition against the defendant that he was to take no objection certificate from the Municipal Corporation or he was to get the

land converted to N.A. purpose and so it is not possible to infer that the defendant was avoiding to execute the sale deed. Sale deed in favour of defendant was executed and registered in the year 2001 and so, for that there was no problem.

- (vii) The plaintiff did not take steps for making the payment of the remaining consideration amount and after about 6 years he gave report to police and got the compromise document executed from defendant in which the price was reduced by Rs.1,18,000/-.
- (viii) The suit was filed in the year 2011 when the transaction was to be completed before 1st March, 2003 by making payment of entire amount of consideration and that way the plaintiff avoided to make payment of major part of consideration and on the contrary compelled the defendant to agree to take less consideration (Rs.1,18,000/-) and due to that inference needs to be drawn that plaintiff was not ready and willing to perform his part of the

contract.

- (ix) Plaintiff did not come before the Court with clean hands and he avoided to complete the transaction for about 9 years and due to that if the relief is given that would give unfair advantage to the plaintiff over the defendant.

13. The trial Court has given finding that the plaintiff has failed to prove that something was to be done by defendant prior to execution of the sale deed and due to inaction of defendant the sale deed could not be executed. The trial Court has given finding that the plaintiff has failed to prove that the suit plot was a part of Nala, brook and there was objection of local body for executing the sale deed. The trial Court has given finding that the plaintiff has failed to prove that the defendant committed breach of the contract. The trial Court has given finding that the plaintiff has failed to prove that he was ready and willing to perform his part of the contract. The trial Court has held that it is not such a case where discretion needs to be used in favour of plaintiff and so the relief of specific performance is not given in favour of plaintiff. However, the trial Court has directed the defendant to return the

amount of Rs.1,46,000/-, the amount paid under the agreement, and also the amount of Rs.3,961/- of which challan is produced by plaintiff to show that this amount was given by him for making payment of N.A. charges. Interest at the rate of 9% p.a. is allowed on this amount.

14. The learned counsel for the Appellant argued much against judgment and order of the first Appellate Court. Learned counsel submitted that only two points, which were considered as issues by the trial Court, are considered by the first Appellate Court and the other points are not specifically touched. It is true that in the judgment delivered by the first Appellate Court following two points are specifically mentioned:

- "a) Whether the agreement of sale as alleged by the plaintiff is lawful, validly executed and binding?*
- b) Whether the plaintiff, who is a purchaser, has complied with the provisions of Sec. 16 (c) of the Specific Relief Act by pleading and establishing that he has performed and has been ready, willing and able to perform their part of the contract?"*

15. In previous paras, like Para No.10 onwards, the District Court has considered the conduct of the plaintiff. The circumstances speaking about conduct of the plaintiff are already mentioned. The first Appellate Court has considered one more circumstance, like plaintiff has filed 5 to 6 cases for specific performance of contract against different persons. The first Appellate Court has considered the inaction on the part of the plaintiff and his conduct of avoiding to make payment even when opportunity was given by the defendant to complete the transaction. The first Appellate Court has considered the material with regard to provision of Section 16 (c) of Specific Relief Act, 1963 and also the provision of Section 20 (1) of the same Act. The first Appellate Court has observed that hardship will be caused to the defendant if the decree of specific performance is given against him after so many years when plaintiff had avoided to make the payment of major part of consideration for so many years. The first Appellate Court has observed that there is sufficient material to show that the defendant was not at fault and the plaintiff has failed to prove that he was ready and willing to perform his part of contract. Thus, it cannot be said that the first

Appellate Court has not considered the relevant points or the material available for deciding the relevant points. The Appellate Court has also considered the main points, like the conduct of the plaintiff, the point of readiness and willingness of the plaintiff and the points which are required to be considered at the time of using discretion under section 20 of the Act.

16. The learned counsel for the Appellant placed reliance of some reported cases like (i) ***AIR 1993 SC 1742 (Smt. Chand Rani (dead) by LRs. V/s Smt. Kamal Rani (dead) by LRs.)***, (ii) ***2001 (2) Mh.L.J. 786 (Santosh Hazari V/s Purushottam Tiwari deceased by L.Rs.)*** and (iii) ***(2005) 7 SCC 60 (Rajeshwari V/s Puran Indoria)***. This Court has carefully gone through the observations made by the Apex Court in the aforesaid cases. In the first case, it is laid down that ordinarily time is not essence of contract when the agreement is of sale of immovable property and the expression to make time essence of contract must be expressed in unequivocal language. There cannot be any dispute over this proposition. The aforesaid circumstances show that in the first agreement time was fixed for making payment of the consideration prior to 1st March, 2003 but

the plaintiff did not make the payment. Subsequent to that date, some consideration was accepted by the defendant and due to this circumstance the trial Court has held that the time was not essence of contract. This circumstance, however, cannot be ignored for deciding other points like, readiness and willingness of plaintiff and the hardship which is likely to be caused to the defendant due to the decree of specific performance. In the second case, the Apex Court has discussed the approach that needs to be used by High Court in second appeal in view of provision of Section 100 of Civil Procedure Code. Same observations are made with regard to the approach which needs to be adopted by the first Appellate Court and those observations are at para No.15 as follows:

"15. ... The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his

opinion as to where the credibility lie, the Appellate Court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Naraian Singh & Ors., AIR 1951 SC 120). Secondly, while reversing a finding of fact the Appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first Appellate Court had discharged the duty expected of it. We need only remind the first Appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first Appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now

ceased to be available to correct the errors of law or the erroneous findings of the first Appellate Court even on question of law unless such question of law be a substantial one."

There is no dispute over proposition made by the Apex Court with regard to the approach which needs to be adopted by the first Appellate Court. This Court has considered the reasoning given by the first Appellate Court and the reasoning is already mentioned. The Apex Court has also made it clear that unless and until High Court is satisfied that substantial question of law is involved in the matter, the High Court is not expected to entertain the second appeal.

17. In the third case, it is laid down by the Apex Court that the order of the High Court in second appeal needs to be a speaking order and the material needs to be quoted by the High Court at-least to some extent on the basis of which inference can be drawn that no substantial question of law is involved in the matter. There cannot be any dispute over this proposition also. In the present matter, this Court has considered the aforesaid circumstances, which are specifically quoted by this Court and which can be

found in the reasoning given by the trial Court. These circumstances are quoted on the basis of material available on the record. On the basis of the material and the conduct of the plaintiff, this Court has no hesitation to observe that the plaintiff is very fortunate to get the relief of refund of the money paid by him to the defendant. It appears that the defendant did not contest the matter properly in respect of the contention that defendant was forced to enter into compromise by using circumstances like pendency of criminal case against the defendant. If that part of material, the compromise document, is excluded from consideration, plaintiff could not have been in a position to get the order of refund of the amount already paid by him. In any case, even after considering that document, it is not possible to accept the case of the plaintiff that he was ready and willing to perform his part of the contract. It is clear that he was not ready to make the payment of entire consideration agreed in the agreement of 2002 and he compelled the defendant to accept the settlement under which defendant was getting less amount of more than 1 Lakh (Rs.1,18,000/-). No justification is given by the plaintiff in respect of this circumstance when

the charges required for N.A. conversion were below Rs.4,000/-.

18. It is already observed that giving of relief of specific performance is within the discretion of the Court. After about 9 years from the date of agreement plaintiff approached Court for getting the relief and he had not paid major portion of the consideration. Defendant has given his evidence that the prices of the properties have increased during this period 4 to 5 times. There is no reason to disbelieve the defendant in respect of such case. Thus, hardship will be certainly caused to the defendant if the decree of specific performance is given against him. Further, the Appellate Court is not expected to lightly interfere in the decision given by the trial Court which has the base of discretionary power. In view of these circumstances, this Court holds that in the second appeal no interference is possible. The findings given by the Courts below are the findings of facts and for that reason also this Court holds that it is not possible to interfere in the decision of the courts below. No substantial question of law as such is involved in the matter.

19. In the result, the appeal is dismissed.

20. In view of final disposal of the second appeal itself nothing further survives in Civil Application No. 15995 of 2015, for injunction and the same stands disposed of accordingly.

(T. V. NALAWADE, J.)

Dt.07/03/2016.
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