

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

***SECOND APPEAL NO. 373 OF 2016.
Along with
CIVIL APPLICATION NO. 605 OF 2016***

Mr.Sitaram Vishnu Sakate ... Appellant / Applicant
V/s.
Sou.Mahadevi Gurulingappa Mangoli & ors. ... Respondents.

Mr.Tejas Dande a/w Mr.Bharat Gadavi and Ms.Shama Mulla, for the
Appellant / Applicant.
Mr.V.M.Thorat a/w Ms.Pooja Thorat, for Respondent Nos.5 & 6.

***Coram : N.M. Jamdar, J.
Monday 2 May, 2016.***

Oral Order :

The Appellant challenges the Judgment and Decree passed by the learned Civil Judge, Senior division, Sangli partly decreeing the Suit filed by the Appellant and granting prayer for refund of earnest money and compensation and refusing the claim of the Appellant for specific performance of contract and the Judgment and Order passed by the District Judge, Sangli dismissing the Appeal.

2. The suit bearing Regular Civil Suit No.152 of 2005 was filed by the Appellant in the Court of Civil Judge, Senior division, Sangli praying for specific performance of Agreement dated 1 October 2001 in respect of Plot Nos.8 and 9 out of the property described in paragraph one of the

plaint. It was the contention of the Appellant that the Respondent No.1 was desirous of developing the property and the property was divided into 22 plots out of which for plot no.8 and 9, the Respondent No.1 entered into an agreement on 1 October 2001 in favour of the Appellant for total consideration of ₹4,40,000. According to the Appellant he paid ₹21,000 and it was the duty of the Respondent No.1 to take Non Agricultural permission (N.A) and thereafter execute Sale deed. The Respondent No.1 failed to execute the Sale deed and the Respondent No.1 was entering into transactions with other persons. The Appellant made inquiries and found out that plots nos.9 and 10 were sold to Respondent Nos.5 to 8 in July 2005. Accordingly, the Appellant filed a Suit seeking specific performance.

3. The Respondents appeared in the Suit and contested the Suit. The learned Civil Judge framed Issues as to the description of the property, the factum of agreement and payment of the amount, readiness and willingness of the Appellant, whether Respondents had deliberately changed the description of the property, whether the agreements are in contravention of the orders of the Court, whether the Appellant is entitled for specific performance and whether the Defendant Nos.2 to 16 were bonafide purchasers for value without notice. The learned Civil Judge, held that the suit property was not properly described. As far as the other issues, the learned Civil Judge held that the factum of agreement was proved so also the readiness and willingness on the part of the Appellant. The learned Judge held that the Respondents deliberately changed the description of the suit property. The learned Civil Judge

concluded that specific performance of the agreement cannot be granted however relief of compensation and return of earnest money was appropriate relief to be granted in the circumstances. Accordingly Suit was decreed by Judgment and Decree dated 31 March 2012. The Appellant thereafter filed Regular Civil Appeal No.313 of 2012 in District Court, Sangli. The learned District Judge held that the Respondent No.1 proved that the specific performance cannot be enforced for want of availability of land after N.A permission. The appellate Court accordingly confirmed the Judgment and Decree passed by the learned Civil Judge for grant of compensation. The Appeal filed by the Appellant was dismissed by order dated 17 February 2016.

4. Mr.Dande, the learned counsel for the Appellant submitted that after the sanction of new N.A lay out the property was available and has been recorded in the order passed by this Court in Appeal from Order No.627 of 2006. The property was now Plot no.4 and a road under new lay out. He submitted that since the entire Plot no.8 and 9 were not lost after the new lay-out was sanctioned but only the area was reduced, the Court could, under Section 12 of the Specific Relief Act 1963, grant specific performance of part of the Contract. He submitted that the Courts have held that the plots as far as the Respondent Nos.5 to 6 are concerned, could be identified, however, when it came to assertion of the Appellant, the learned Judge has observed that the area could not be located. He submitted that when the Respondent Nos.5 and 6 had applied for N.A permission, it was granted subject to conditions on 8 August 2003 which conditions have not been complied with by

Respondent Nos.5 and 6 and therefore, their Sale deeds are void and illegal. He submitted that the Sale deeds in favour of Respondent Nos.5 and 6 are also in violation of the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 and in breach of Section 27 of the said Act. Mr.Dande also submitted that both the Courts had misunderstood the prayer of damages which was only a prayer in addition to the prayer for specific performance and not in alternative. Mr.Thorat, the learned counsel for the Respondents, on the other hand, submitted that the Appellant was seeking specific performance of an agreement and was unable to point out the exact location of the property. He submitted that inspite of being aware of the fact that due to grant of N.A permission substantial part of the property had gone in public amenities and road and that plot No.9 and 10 were sold to Respondent Nos.5 and 6, he has not chosen to challenge the grant of N.A permission or to challenge the Sale deeds executed in favour of Respondent No.5 and 6. The simplistic relief for specific performance, as sought is rightly held by both the Courts, has become impossible to perform.

5. The agreement in favour of the Appellant was executed on 1 October 2001. The agreement in favour of Respondent Nos.5 and 6 was executed on 8 August 2003 both the Respondent No.1 and Respondent Nos.5 and 6, had applied for N.A permission. The area of 14,400 sq.mtrs. after the N.A. permission was granted, was reduced to 5100 mtrs. This was because 2000 sq.mtrs were lost in a stream, 6950 sq.mtrs. for road, 600 sq.mtrs for open space, and 200 sq.metres for internal road.

The property therefore underwent a complete change. All these facts were in full knowledge of the Appellant. The Appellant did not seek appointment of any Commissioner for demarcating the area and demonstrate as to how the agreement could be specifically enforced. The agreement in favour of Respondent Nos.5 and 6 initially was around 10,000 sq.ft. and after new lay out, the area was reduced to 5000 sq.ft. The Trial Court considered the evidence led by the parties and the implications of the N.A. Permission. The Trial Court found that in view of the new lay-out, it was crucial for grant of specific performance, that the Appellant is able to identify the property to be conveyed. The trial Court found that the Appellant failed to do so and therefore relief of grant of compensation and return of earnest money, was proper. The appellate Court also found that the specific relief in the circumstances was not the appropriate relief that could be granted as it was impossible to grant specific performance of the agreement.

6. Most of the arguments advanced by Mr.Dande are regarding the correctness of the transactions in favour of Respondent Nos.5 and 6. If that was the position, nothing stopped the Appellant from seeking a declaration that the permissions obtained by Respondent Nos.5 and 6 were invalid, so also their Sale deeds. The Appellant had chosen to approach the court with a simple case of specific performance of agreement, which in view of the events that have occurred even prior to the filing of the Suit, had become impossible to enforce. The reliance is placed by Mr.Dande, on the decision of *Phool Pata and another Vs Vishwanath Singh and others* -(2005) 6 SCC 40 to contend that increase

or decrease in the area in Consolidation Proceedings would amount to substantial questions of law. In the cited decision, it was not the position that consequent upon the change in area, the Plaintiff therein had failed to demonstrate that the area under agreement remained and was not the position that the Plaintiff therein could not point out the area in question of which the agreement could be specifically enforced. The Apex Court held that the approach of the High Court that a variation in area will not amount to substantial questions of law, was not correct. In the present case, the variation in area is an admitted position but the question that arises is right of the Plaintiff to seek specific performance in the circumstances. The argument based on breach of terms and breach of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, relates challenge to the Sale deeds in favour of Respondent Nos.5 and 6, which cannot be entertained as there is no such prayer in the plaint.

7. As stated earlier, the Suit is filed for specific performance of the Agreement and both the Courts have concurrently held that it is not possible to grant the discretionary relief. There is no perversity in exercise of discretion by both the Courts. The prayer clause (d) in the plaint regarding compensation clearly states that in the alternative, the damages of ₹ 10,00,000 be paid to the Appellant. Both the Courts have granted ₹5,00,000 to the Plaintiff and have not granted claim of specific performance, which I have already held was a correct use of discretion. Therefore as regards grant of damages, this part of the order is in favour of the Appellant and therefore, it is upto the Appellant to avail of the same

or not. No other questions were urged. No substantial question of law arises. Second Appeal is accordingly dismissed.

8. The learned counsel for the Appellant seeks grant of some protection for some time. The learned counsel for Respondent Nos.5 and 6 states that for the period of six weeks the Respondent No.5 and 6 will not create any third party rights or part with the possession of property. This statement on instructions is accepted. Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)