

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 457 OF 2012
ALONGWITH
CIVIL APPLICATION NO. 925 OF 2012

Shamrao Vithoba Jadhav,
Since deceased through legal heirs & Ors. Appellants

VERSUS

Balaso Piraji Wani Respondent

Mr.S.S.Patwardhan for the Appellants.

Mr.P.D.Dalvi for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 30th NOVEMBER, 2016

P.C.

By this second appeal filed under section 100 of the Code of Civil Procedure, 1908 the appellants (original defendants) have impugned the judgment and decree dated 18th November, 2011 passed by the learned District Judge-1, Kolhapur dismissing the Regular Civil Appeal No.19 of 2008 filed by the defendants by which the defendants have impugned the judgment and decree dated 16th November, 2007 passed by the learned trial judge thereby decreeing the said suit filed by the original plaintiff inter alia praying for specific performance of the agreement dated 18th February, 1997.

2. It is not in dispute that the suit agreement was signed by the defendant no.1 who was karta of the family in favour of the original plaintiff. Under the said agreement, the plaintiff paid certain consideration amount to the defendant no.1. It was the case of the plaintiff that since the defendant no.1 did not execute the sale

deed, the plaintiff filed a suit for specific performance. The suit was resisted by the defendants by filing a written statement. During the pendency of the suit, the suit property was transferred in favour of the defendant nos. 6 and 7.

3. The learned trial judge framed six issues. The plaintiff entered the witness box. The defendant no.1 had executed a power of attorney in favour of his son who was also one of the party to the suit and was examined as one of the witness.

4. The learned trial judge passed a judgment and decree on 16th November, 2007 thereby decreeing the said suit for specific performance and directing the defendant nos. 1 to 5 to execute the sale deed in favour of the plaintiff. The plaintiff was directed to make the payment of the balance consideration of Rs.65,000/- within one month from the date of the said order. The learned trial judge also declared the sale deed entered into between the defendant no.1 to 5 and defendant nos. 6 and 7 as illegal and null and void and not binding on the plaintiff.

5. Being aggrieved by the said judgment and decree, all the defendants filed an appeal (RCA No. 19 of 2008) in the court of learned District Judge-1, Kolhapur. Learned District Judge formulated six points for determination and by judgment and decree dated 18th November, 2011 dismissed the said RCA No. 19 of 2008 filed by the defendants. This judgment and decree of the first appellate court has been impugned by the defendants in this second appeal.

6. Mr.Patwardhan learned counsel appearing for the defendants submits that though the defendants had specifically denied the averments made by the plaintiffs about his alleged readiness and willingness to comply his part of the obligation, the learned trial judge neither framed any issue on the plea of readiness and

willingness nor rendered any findings. He submits that though the defendants had raised a ground in the memorandum of appeal filed before the learned District Judge in this regard, the first appellate court also did not frame any issue of readiness and willingness and did not decide the said issue.

7. The next submission of the learned counsel for the defendants is that the suit was barred by law of limitation. It is submitted by the learned counsel that though a specific issue was raised by the defendants that the 1st defendant could not have entered into an agreement for sale with the plaintiffs since there was no illegal necessity for him to sale the suit property, neither the learned trial judge nor the first appellate court framed any specific issue and did not render any finding thereof.

8. Mr.Dalvi, learned counsel for the original plaintiff on the other hand submits that the suit agreement was executed on 18th February, 1997 and the suit for specific performance was filed on 8th July, 1999. The suit for specific performance was thus filed within time. Insofar as submission of the learned counsel for the defendants that no specific issue for readiness and willingness was framed by the learned trial judge and also by the first appellate court and that there was no finding rendered on the said issue is concerned, learned counsel for the plaintiff invited my attention to the issue no.4 framed by the learned trial judge and the findings rendered by the learned trial judge on that issue in paragraph (19) of the impugned judgment and decree passed by the learned trial judge. He also invited my attention to the points for determination formulated by the first appellate court and also the findings recorded by the first appellate court on those issues. He submits that both the courts below have specifically held that the suit agreement was executed by and between the parties and the plaintiff was always ready and

comply with his part of the obligation.

9. Insofar as submission of the learned counsel for the defendants that there was no issue regarding the legal necessity of the defendant no.1 to enter into an agreement to sale with the plaintiff and there being no finding thereon is concerned, learned counsel for the plaintiff invited my attention to the findings recorded by the two courts below and would submit that the defendant no.1 had taken loan on behalf of the family and the purpose of repayment of the said loan had been noted in the agreement to sale with the plaintiff on behalf of the family. He submits that the findings of the two courts below being concurrent and not perverse cannot be interfered with by this court in this appeal under section 100 of the Code of Civil Procedure.

10. Insofar as issue of limitation raised by the learned counsel for the defendants is concerned, it is not in dispute that both these courts have rendered a finding of fact that the suit agreement dated 18th February, 1997 was executed between the plaintiff and the defendant no.1 on behalf of his family members. Admittedly, the suit was filed on 8th July, 1999. In my view there is thus no substance in the submission of the learned counsel for the defendants that the suit for specific performance filed by the plaintiff was barred by law of limitation.

11. Insofar as second submission of the learned counsel for the defendants about the issues and findings in respect of the plea of readiness and willingness is concerned, a perusal of issue no.4 and the findings rendered in respect thereof and more particularly paragraph (19) of the judgment and decree passed by the learned trial judge clearly indicates that the learned trial judge has rendered the finding of fact that the plaintiff had made certain part payment to the defendant no.1 and had

agreed to pay the balance amount. It is also held that since inception, the plaintiff was ready and willing to comply with his part of the obligation.

12. A perusal of the findings recorded by the first appellate court indicates that the first appellate court has independently considered the oral and documentary evidence led by the parties and have confirmed the findings rendered by the learned trial judge. It is not in dispute that the defendant no.1 who had executed the agreement for sale in favour of the plaintiff himself did not enter the witness box to prove the allegations made in the written statement but had examined his son who was one of the party defendant to the suit. In my view the son of the defendant no.1 who was examined as a witness could not have prove the averments made by the defendant no.1 in the written statement. He had no personal knowledge of the facts.

13. Insofar as the issue as to whether issue of legal necessity was framed by the learned trial judge or not is concerned, a perusal of the order passed by the two courts below clearly indicates that it was admitted position that the defendant no.1 had taken loan and for the purpose of repayment, the suit property was required to be sold in favour of the plaintiff. Both the courts below have considered this crucial aspect in the judgment and decree and has held that the loan was obtained by the first defendant. Be that as it may, the fact remains that the defendant no.1 had entered into the sale agreement in respect of the suit property alongwith others in favour of the defendant nos. 6 and 7. In my view there is thus no merit in this submission of the learned counsel for the defendants. The findings of the two courts below being concurrent and not perverse and thus cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908.

14. In my view the appeal is devoid of merits. No substantial question of law has arisen in this appeal. Second appeal is dismissed. No order as to costs.

15. In view of dismissal of second appeal, civil application does not survive and is accordingly dismissed.

(R.D.DHANUKA, J.)