

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 223 OF 2015****ALONGWITH****CIVIL APPLICATION NO.460 OF 2015**

Namdeo Nivrutti Marane)
Age :-54, Occu :- Agriculturist,)
R/at :- Marane Wadi, Ambegaon,)
Tal :- Mulshi, Dist :- Pune) **..... Appellant**

VERSUS

Vilas Bhikaji Marane)
Age :- 55 years, Occu :- Service,)
R/at :- Flat No.1, Raghunandan Apts.)
SeemaSagar Society, Plat No.11,)
Sukhsagar Nagar, Opp.Telephone Bhawan)
Katraj, Pune – 400046) **..... Respondent**

Mr.Pramod Pawar for the Appellant.

Mr.Avinash Avhad for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 16th AUGUST, 2016

JUDGMENT

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the judgment and decree dated 21st February, 2015 passed by the learned District Judge -2, Pune dismissing the Civil Appeal (322 of 2014) filed by the appellant. In the said appeal, the appellant had impugned the judgment and decree dated 31st March, 2011 passed by the 4th Joint Civil Judge, Senior Division, Pune by which the suit filed by the respondent for possession was partly decreed with cost. By the said judgment and decree, the learned trial judge directed the respondent herein to deposit a sum of

Rs.1,08,000/- in the Court of Joint Civil Judge, Senior Division and directed the appellant herein to handover the vacant possession of the suit land to the respondent on or before 30th June, 2011. The learned trial judge accordingly granted liberty to the appellant herein to withdraw the said amount if deposited by the respondent.

2. By an order dated 27th July, 2016 passed by this court, it was directed that this appeal shall be taken up for final disposal on 3rd August, 2016. This court has accordingly heard the learned counsel appearing for the parties at length for hearing and final disposal of this appeal at the admission stage. Some of the relevant facts for the purpose of deciding this appeal are as under :-

3. The respondent and his five sisters are admittedly the co-owners of the suit land bearing Gat No.122 admeasuring 27 Ares situated at Village Marnewadi, Taluka Mulshi, Dist. Pune. On 6th January, 2004, the appellant and the respondent entered into an agreement to sale in respect of the suit property for total consideration of Rs.1,08,000/- i.e. at the rate of Rs.4,000/- per Ares. The respondent handed over possession of the suit land to the appellant. The appellant paid a sum of Rs.98,000/- to the respondent out of the agreed consideration. In the said agreement to sale, it was agreed between the parties that the excess land shall be first measured and the same shall be purchased by the appellant at the rate of Rs.4,000/- per Ares. The respondent accordingly appointed the agencies for taking measurement of suit property.

4. It was the case of the respondent that the said measurement was carried out in presence of the appellant by such agency and it was found that the suit property was totally admeasuring 34 Ares. It was however the case of the

appellant that the measurement of the suit property was required to be carried out by the Government land Demarcation Officer and not by any private surveyor.

5. It was the case of the appellant that unless the respondent would have signed on an application for taking measures by the demarcation measurement officer, the said property could not have been measured. The respondent failed to sign on such application though repeatedly called upon by the appellant. It is the case of the appellant that the appellant was always ready and willing to pay the balance consideration amount upon the said measurement being taken by the Government demarcation officer and not by a private surveyor on the other hand. It was the case of the respondent that the appellant had agreed for such measurement through a private surveyor which was actually carried out in presence of the appellant and that the appellant had agreed to such measurement. It was the case of the respondent that since the appellant did not take any step to comply with their part of the obligation under the said agreement to sale, the respondent terminated the said agreement to sale dated 6th January, 2004 vide notice dated 8th August, 2005.

6. Sometime in the year 2005, the appellant herein filed a suit (Special Civil Suit No.1190 of 2005) against the respondent herein in the Court of Civil Judge, Senior Division, District Pune inter alia praying for specific performance of the suit agreement. The respondent herein filed a suit on 11th December, 2007 (2218 of 2007) in the Court of Civil Judge, Junior Division, Pune inter alia praying for possession of the suit property against the appellant. On 15th March, 2008 the appellant filed the written statement and contested the said suit (2218 of 2007) and denied the claim made by the respondent.

7. On 4th July, 2010, the advocate who was representing the appellant met with an accident and was hospitalized in Intensive Care Unit of the hospital in Pune on 4th July 2010 and was discharged on 11th August, 2010. It is the case of the appellant that the advocate for the appellant was advised bed rest by his doctors till 11th November, 2010.

8. Since the appellant and his advocate were absent from time to time, the learned Civil Judge, Junior Division, recorded the evidence of the respondent and closed the cross examination of the appellant. On 31st March, 2011, the learned trial judge delivered a judgment and decree thereby partly decreed the said suit and directed the respondent (original plaintiff) to deposit a sum of Rs.1,08,000/- in the Court of learned Joint Civil Judge, Senior Division, directed the appellant to handover vacant possession of the suit land to the respondent on or before 30th June, 2011 and granted liberty to the appellant to withdraw the said amount deposited.

9. The respondent thereafter filed a Darkhast application for execution of the said decree dated 31st March, 2011 which was served upon the appellant on 19th December, 2011. The respondent thereafter filed an appeal on 27th March, 2012 (322 of 2014) in the District Court Pune alongwith delay condonation application. There was delay of 11 months and 27 days in filing the said appeal.

10. In the meanwhile, the Special Civil Suit No.1190 of 2005 filed by the appellant inter alia praying for specific performance of the agreement to sale against the respondent came to be dismissed for default on 10th February, 2011. The appellant herein has not made any application for restoration of the said suit admittedly till date.

11. In the said Civil Appeal No.322 of 2014 which was filed by the appellant herein, the appellant filed an affidavit in lieu of examination in chief to prove the delay of 11 months and 27 days. In the said affidavit in lieu of examination in chief, the appellant alleged that the then advocate of the appellant Shri Badhe was hospitalized and was discharged on 11th August, 2010 and was advised bed rest till 11th November, 2010. The appellant however remained absent for the purpose of cross examination. The Appellate Court passed an order on 11th June, 2013 that since the appellant was absent for the purpose of cross examination on the affidavit of the appellant in lieu of evidence his affidavit shall be ignored. The Appellate Court however allowed the said application for condonation of delay by passing a separate order on 10th June, 2014 on the ground that the litigant should not suffer at the cost of their counsel and imposed cost of Rs.10,000/- upon the appellant.

12. By a judgment and order dated 21st February, 2015 the learned District Judge – 2, Pune dismissed the said Civil Appeal No. 322 of 2014 filed by the appellant. This judgment and decree of the Appellate Court has been impugned by the appellant in this appeal filed under section 100 of the Code of Civil Procedure, 1908.

13. Learned counsel appearing for the appellant invited my attention to the pleadings and documents filed by the respondent in the Suit No. 2218 of 2007, the impugned judgment and decree passed by the learned trial judge on 31st March, 2011, the affidavit in lieu of examination in chief filed by the appellant before the Appellate Court, the judgment and order passed by the learned District Judge – 2 dated 21st February, 2015. It is submitted by the learned counsel that the learned

advocate who was representing the appellant had met with a serious accident on 4th July, 2010 and was in Incentive Care Unit from 4th July, 2010 till 11th August, 2010. He submits that the learned advocate was advised bed rest till 11th November, 2010. It is submitted that the appellant was not aware of the decree passed by the learned trial judge dated 31st March, 2011 till the Darkhast application filed by the respondent was served upon the appellant on 19th December, 2011. He submits that because of the hospitalization of the learned advocate who was then representing the appellant and the appellant not having knowledge about the accident of his advocate, the appellant could not remain present before the learned trial judge and the appellant and his advocate could not remain present before the learned trial judge when the evidence of the respondent was being recorded by the learned trial judge and at the time of oral arguments. It is submitted by the learned counsel for the appellant that though the appellate court had condoned the delay application filed by the appellant and had accepted the plea of the appellant that the appeal could not be filed within the time on the ground that his advocate was hospitalized, the appellate court did not consider the said fact and instead of remanding the matter to the learned trial judge, dismissed the said appeal.

14. It is submitted by the learned counsel for the appellant that though the suit for specific performance filed by his client was dismissed by the trial court in the year 2011 and an application for restoration of the said suit was not made by the appellant, the respondent was bound to prove his case independently inter alia praying for possession of the suit property from the appellant. He submits that the respondent however could not prove the default if any committed by the appellant of his obligation under the said agreement to sale and thus the learned trial judge could not have passed any decree for possession of the suit property against the

appellant. He submits that the appellate court also did not consider this crucial aspect in the impugned judgment and order and has erroneously rejected the appeal filed by the appellant. It is submitted that the impugned decree passed by the learned trial judge be set aside and the matter be remanded back to the learned trial judge for giving an opportunity to the appellant to lead evidence and to make his submission on merits.

15. Learned counsel for the respondent (original plaintiff) on the other hand invited my attention to the Roznama of the civil suit filed by the appellant and also of the civil suit filed by the respondent. He submits that admittedly the civil suit filed by the appellant for specific performance of the agreement is dismissed by the trial court as far back as on 10th February, 2011. The appellant has not made any application for restoration of the said suit even till date. He submits that the said suit was dismissed by the learned trial judge in view of the appellant and his advocate remaining absent even during the period when the earlier advocate of the appellant was not hospitalized. He submits that in the suit filed by the respondent for possession against the appellant, the appellant deliberately remained absent.

16. It is submitted that even if the arguments of the appellant are accepted that his earlier advocate was advised to take bed rest till 11th November, 2010, the said suit filed by the respondent was disposed of on 31st March, 2011. He disputed the statement made by the learned counsel for the appellant that his client was not at all aware of the progress of the suit filed by the respondent and came to know about the said decree dated 31st March, 2011 only when the Darkhast application filed by the respondent was served upon the appellant on 19th December, 2011.

17. It is submitted by the learned counsel that since the suit for specific performance filed by the appellant was already dismissed, the appellant could not resist the suit for possession filed by the respondent against the appellant. He submits that the possession of the appellant of the suit premises was totally illegal and he was a trespasser thereon. He submits that the respondent had proved his case by leading oral and documentary evidence before the learned trial judge.

18. It is submitted by the learned counsel for the respondent that the suit agreement to sale was not even registered. The appropriate amount of the stamp duty payable on the said agreement was also not paid. He submits that the appellant thus could not have claimed protection under section 53A of the Transfer of Property Act, 1882 read with section 17(1A) of the Registration Act, 1908. He submits that all these aspects were dealt with by the learned trial judge in the impugned judgment and order dated 31st March, 2011 and also by the appellate court in the judgment and order dated 21st February, 2015.

19. Insofar as submission of the learned counsel for the appellant that the then advocate of the appellant was hospitalized and the appellant was not aware of the accident of the learned advocate and about the progress of the suit is concerned, it is submitted by the learned counsel for the respondent that though the appellant had filed an affidavit in lieu of examination in chief inter alia praying for condonation of delay and to justify the delay of more than 11 months on the ground of sickness of his advocate, the appellant remained absent before the appellate court and thus his evidence was closed and it was ordered not to consider the said affidavit in lieu of examination in chief. He submits that though such an issue was raised in the affidavit in lieu of examination in chief by the

appellant, he could not be cross examined in view of his absence, the appellant did not press that issue before the Appellate Court. In support of this submission, learned counsel for the respondent invited my attention to the averments made in the affidavit in reply filed in this appeal and would submit that there is no rejoinder to the said averments made by the respondent.

20. It is submitted by the learned counsel for the respondent that the findings recorded by the two courts below are concurrent findings of fact and being not perverse cannot be interfered with by this court under section 100 of the Code of Civil Procedure.

21. Learned counsel appearing for the appellant submits that the matter be remanded back to the learned trial judge for rendering an opportunity to the appellant to cross examine the respondent and to make oral submissions. He submits that no prejudice would be caused to the respondent if this request of the appellant is considered by this court.

REASONS AND CONCLUSIONS

22. There is no dispute that the appellant herein had filed a suit (Special Civil Suit No.1190 of 2005) against the respondent inter alia praying for specific performance of the agreement to sale dated 6th January, 2004 in respect of the suit property. There is no dispute that the said suit came to be dismissed for default on 10th February, 2011. The appellant has not applied for restoration of the said suit even till date though the appellant was fully aware of the dismissal of the said suit in the year 2011 itself. A perusal of the Roznama produced on record of the said Special Civil Suit No.1190 of 2005 which was filed by the appellant herein against

the respondent for specific performance of the agreement to sale clearly indicates that on large number of dates when the said suit appeared before the learned trial judge even prior to the date of accident of the erstwhile advocate of the appellant, the appellant and his advocate were absent. The appellant never bothered to apply for the restoration of the said suit even till date i.e. after more than five years.

23. Insofar as the proceedings of the Special Civil Suit No.2218 of 2007 filed by the respondent herein against the appellant for possession is concerned, there is no dispute that the appellant herein had filed a written statement in the said suit. The said suit also appeared on board on number of dates when the appellant and his advocate were absent. The earlier advocate of the appellant was discharged on 11th August, 2010. The learned trial judge had passed an judgment and decree on 31st March, 2011. I am not inclined to accept the submission of the learned counsel for the appellant that till 19th December, 2011 when the Darkhast application was served upon the appellant, the appellant was not even aware of the progress of the suit or about the accident of his advocate.

24. Be that as it may, the fact remains that the suit filed by the appellant for specific performance i.e. Special Civil Suit No.1190 of 2005 in respect of the same agreement to sale under which the appellant had obtained possession of the suit property in part performance of the said agreement is already dismissed as far back as on 10th February, 2011. The question that arose before the learned trial judge was whether the appellant could be allowed to continue his possession of the suit property under section 53-A of the Transfer of Properties Act after the Special Civil Suit No.1190 of 2005 for specific performance of the such agreement came to be dismissed.

25. A perusal of the impugned judgment and decree dated 31st March, 2011 passed by the learned trial judge indicates that the learned trial judge has framed six issues. The learned trial judge has held that the appellant had admitted in the written statement that the respondent and his sisters were the co-owners of the suit land. After considering the oral evidence led by the respondent, the learned trial judge rendered a finding that the respondent (original plaintiff) had proved that the appellant was not ready and willing to perform his part of the contract in question inspite of his readiness and willingness to perform his part of contract. The learned trial judge also rendered a finding that the respondent herein had proved that the appellant had committed breach of the terms and conditions of the agreement to sale and had lawfully terminated. The learned trial judge held that the respondent (original plaintiff) was entitled for possession of the suit land.

26. A perusal of the impugned judgment and decree passed by the learned trial judge indicates that the learned trial judge has also considered an admitted position that the suit agreement to sale was not registered. The learned trial judge considered the provisions of section 17(1A) and proviso of section 49 of the Registration Act and also the provisions of section 53A of the Transfer of Property Act and has rightly held that the suit agreement not having been registered, in view of “The Registration and other Related Laws (Amendment) Act, 2001”, the purchaser cannot protect his possession of the property under section 53-A of the Transfer of Property Act if the agreement to sale was not registered and duly stamped. In my view, in view of the admitted fact that the suit agreement was not registered, in view of the amendment to section 17 i.e. section 17(1A) of the Registration Act, the appellant even otherwise could not have been granted protection of the possession obtained as and by way of part performance under an

agreement to sale for the purposes of section 53A of the Transfer of Property Act, 1882.

27. A perusal of the judgment and order passed by the appellate court indicates that the appellant court has framed six points for determination and has independently considered the oral evidence led by the respondent and has after taking cognizance of the oral and documentary evidence on record has rendered a finding of fact that the appellant was not ready and willing to perform his part of the contract. The appellate court has also rendered a finding that the respondent (original plaintiff) is entitled for possession of the suit land. The appellate court has also upheld the view taken by the learned trial judge insofar as protection of possession under section 53A of the Transfer of Property Act read with section 17(1A) read with section 49 of the Registration Act is concerned.

28. In my view there is no merit in the submission of the learned counsel for the appellant that the respondent had not independently proved his case for possession of the suit property. The suit for specific performance filed by the appellant has been admittedly dismissed as far back as on 11th February, 2011. No application for restoration of the said suit is made by the appellant even till date. In my view respondent was thus entitled to be granted possession in respect of the said property in which the appellant could not prove any right, title or interest of any nature whatsoever. The ownership of the respondent and his sisters in the suit property was admitted by the appellant in the written statement. The respondent had led evidence before the learned trial judge to prove that the appellant was a trespasser on the suit property and had committed breach of his obligation under the terms and conditions of the agreement to sale.

29. Be that as it may, in view of the fact that the suit agreement was admittedly not registered, the possession of the appellant even otherwise could not have been protected in view of the section 17A read with section 49 of the Registration Act. In my view the learned trial judge as well as the appellate court are right in holding that in view of the admitted fact that the suit agreement was not registered, the possession of the appellant under section 53A of the Transfer of Property Act could not have been protected.

30. Insofar as submission of the learned counsel for the appellant that the then advocate of the appellant was hospitalized and therefore he could not remain present before the learned trial judge to cross examine the respondent or could not remain present at the time of submission made by the respondent is concerned, it is the case of the respondent in the affidavit in reply that though the appellant had raised this issue in the memorandum of appeal before the appellate court, the said issue was not pressed by the appellant at the time of oral arguments. Though the specific plea in this respect is raised by the respondent in the affidavit in reply in these proceedings, the appellant has not controverted this plea by filing any rejoinder. The learned counsel appearing for the appellant also could not controvert this plea during the course of oral arguments in this appeal.

31. The appellant has not bothered to file an affidavit of the learned advocate who was then representing the appellant in support of his case that the appellant was not aware of the progress of the proceedings for last several years. I am thus not inclined to accept the submission of the learned counsel for the appellant that the matter deserves to be remanded back to the learned trial judge.

32. In my view the findings recorded by the learned trial judge as well as by the appellate court are based on the pleadings and documentary evidence and after considering the oral evidence led by the respondent and the findings being not perverse cannot be interfered with by this court in this appeal under section 100 of the Code of Civil Procedure, 1908. In my view, there is no substantial question of law having arisen in this second appeal. Appeal is devoid of merits. I, therefore, pass the following order :-

(a) Second Appeal No.223 of 2015 is dismissed. In view of dismissal of the Second Appeal No.223 of 2015, Civil Application No.460 of 2015 does not survive and is accordingly dismissed. No order as to costs.

(b) Learned counsel appearing for the appellant seeks continuation of the ad-interim order granted by this court on 24th March, 2015 for a period of eight weeks from today. When the learned counsel for the appellant applied for continuation of the ad-interim order, the learned counsel for the respondent was absent though served. On oral application of the learned counsel for the appellant, ad-interim order passed by this court on 24th March, 2015 in terms of prayer clauses (b) and (c) of the civil application no.460 of 2015 to continue for a period of eight weeks from today on the conditions mentioned in the said order i.e. subject to the appellant not parting with possession of the suit land.

(c) The appellant shall not create any third party rights in respect of the suit property during the period of continuation of the ad-interim order.

[R.D. DHANUKA, J.]