

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

**SECOND APPEAL NO.512 OF 2015
along with
CIVIL APPLICATION NO.1113 OF 2015**

Ramkrishna N. Rai .. Appellant
Vs.
Manohar Shivram Parab & Anr. .. Respondents

Mr.Diwakar Dwivedi for the Appellant.
Mr.Ashutosh Gole for the Respondent no.1.

CORAM : R.D. DHANUKA, J.
DATE : 16th December 2016

P.C.

. By this appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the judgment and order dated 2nd May 2015 passed by the learned District Judge-07 and Assistant Sessions Judge, Thane dismissing the Civil Appeal No.125 of 2013 filed by the appellant. In the said appeal, the appellant had impugned the judgment and decree dated 30th March 2013 passed by the learned trial Judge thereby decreeing the suit filed by the respondents (original plaintiffs) and directing the appellant herein to hand over vacant possession of the suit flat to the respondents herein and granting injunction against the appellant in respect of the suit flat. The first appellate Court also declared that the suit agreement stood cancelled.

2. The appellant and the respondent no.1 had entered into an agreement for sale on 30th December 2003 in respect of the flat situated at Mira Road, Taluka Navghar, District Thane. It was the case of the

appellant that the total consideration of the suit flat was Rs.4,40,000/-. Out of the said consideration, the appellant had already paid a sum of Rs.4,31,000/- to the respondents by various cheques and also in cash. It was the case of the respondents, on the other hand, that the appellant had only paid a sum of Rs.70,000/- as against the total consideration of Rs.4,40,000/- and since the appellant did not pay balance amount in accordance with the terms and conditions of the said agreement for sale, the respondent no.1 terminated the said agreement for sale vide notice dated 8th August 2009. It was the case of the respondents that the appellant forcibly took possession of the suit flat which resulted in the respondents also filing a criminal complaint against the appellant.

3. The respondents filed a suit (Regular Civil Suit No.887 of 2012) inter alia praying for declaration, possession and injunction. The suit was resisted by the appellant by filing a written statement. Both the parties led oral as well as documentary evidence before the learned trial Judge. The learned trial Judge framed seven issues and passed a judgment and decree on 30th March 2013 directing the appellant to hand over vacant possession of the suit flat and granting injunction against him in respect of the suit flat and declaring the suit agreement as cancelled. Learned trial Judge held that the appellant herein had failed to prove that he had paid the entire consideration amount before cancellation of the agreement for sale. The respondent no.1 had proved the termination of the contract. It is held by the learned trial Judge that the appellant had unauthorisedly taken possession of the suit flat. Learned trial Judge disbelieved the evidence led by the appellant by recording detailed reasons.

4. The appellant filed an appeal before the learned District Judge (Civil Appeal No.125 of 2013). The learned District Judge formulated five points for determination and after considering the oral and documentary evidence dismissed the appeal filed by the appellant by a judgment and decree dated 2nd May 2015. This judgment and decree dated 2nd May 2015 is impugned by the appellant in this second appeal.

5. Mr.Dwivedi, learned counsel appearing for the appellant submits that the appellant had already paid consideration of Rs.4,31,000/- out of Rs.4,40,000/- to the respondents. He submits that the appellant was not served with a copy of any notice of termination of the agreement for sale. He submits that agreement for sale was duly registered and the appellant was put in possession of the suit flat in part performance of the agreement for sale under Section 53A of the Transfer of Property Act, 1882.

6. It is submitted by the learned counsel that the appellant had examined another flat purchaser in the said building who had proved that the possession of the suit flat was given by the respondents to the appellant in part performance of the agreement for sale. He submits that the evidence led by the appellant has not been properly considered by the Courts below.

7. It is lastly submitted by the learned counsel that the first appellate Court has not considered various judgments relied upon by the appellant in the impugned judgment and decree. It is submitted that the appellant is in possession of the suit flat for last several years and has been paying maintenance and electricity charges in respect of the suit

flat. He submits that at this stage also the appellant is ready and willing to pay the balance amount with interest to the respondents.

8. Mr.Gole, learned counsel appearing for the respondents, on the other hand, submits that the appellant had failed to prove the consideration over and above the sum of Rs.70,000/- as against the total consideration of Rs.4,40,000/- under the said agreement for sale. It is submitted that the appellant had forcibly entered the suit flat illegally without payment of the entire consideration amount. He submits that both the Courts below have considered the entire evidence led by both the parties and rendered findings of facts and these findings of facts being concurrent and not being perverse cannot be interfered with under Section 100 of the Code of Civil Procedure, 1908.

9. A perusal of the record indicates that the learned trial Judge has considered the oral and documentary evidence led by both the parties and has rendered a finding of fact that the appellant had failed to prove the payment of the entire consideration. It is held that the appellant had forcibly entered the suit flat and could not prove that the possession of the suit flat was handed over by the respondents to the appellant under the said agreement for sale or that the same was in part performance of the agreement under the provisions of Section 53A of the Transfer of Property Act, 1882.

10. A perusal of the oral evidence led by both the parties before the learned trial Judge clearly indicates that the appellant could not prove before the learned trial Judge that the appellant had paid a sum of Rs.4,31,000/- as canvassed by the appellant before the learned trial Judge.

The appellant had only paid a sum of Rs.70,000/-. The appellant could not produce any proof of alleged payment of balance amount before the learned trial Judge though examined the witnesses. In these circumstances, the learned trial Judge as well as the first appellate Court were right in holding that the appellant had failed to prove the balance consideration which resulted in termination of the agreement for sale.

11. In so far as the submission of the learned counsel for the appellant that the appellant was not served with a copy of any notice of termination is concerned, the learned trial Judge has rendered a finding of fact that the appellant did not claim the said notice issued by the respondents which amounted to a good service.

12. In so far as the submission of the learned counsel for the appellant that the first appellate Court did not consider the judgments referred to and relied upon by the appellant is concerned, a perusal of the judgment and decree of the first appellate Court indicates that the first appellate Court has considered those two judgments which were relied upon by the appellant in support of this argument that the possession of the suit flat was given to the appellant in part performance of the agreement for sale. Since two Courts below have rendered a finding of fact that the appellant had forcibly entered the suit flat unauthorizedly, in my view, question of his possession under Section 53A of the Transfer of Property Act, 1882 did not arise. In my view, even otherwise reliance placed by the appellant before the first appellate Court was totally misplaced and did not assist the case of the appellant.

13. In so far as the submission of the learned counsel for the appellant that even at this stage, the appellant is ready and willing to pay balance amount with interest is concerned, the learned counsel for the respondents is not agreeable to accept this proposal. He submits that the market rate of the suit flat is much more than the amount offered by the appellant.

14. In my view, the judgments and decrees passed by the two Courts below are passed after considering the oral and documentary evidence and being concurrent and not being perverse cannot be interfered with under Section 100 of the Code of Civil Procedure, 1908. No substantial question of law arises in this second appeal.

15. Second appeal is accordingly dismissed. In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed. No order as to costs.

16. The respondents would be at liberty to apply for withdrawal of the amount deposited by the appellant before the Executing Court which were paid pursuant to the interim order passed by the first appellate Court. If any such application is filed, the Executing Court shall permit the respondents to withdraw the said amount expeditiously.

R.D. DHANUKA, J.