

JPP

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

*SECOND APPEAL NO. 934 OF 2015
with
CIVIL APPLICATION NO. 2018 OF 2015*

Mr. Narendra Pandharinath Shirude. ... Appellant/Applicant.

V/s.

Mr. Vijay Bhimrao Desale. ... Respondent.

Mr. A.G. Damle, Sr. Advocate a/w. Sachin Gite for the
Appellant/Applicant.

Mr. J.M. Pathade for the Respondent.

CORAM : N.M. Jamdar, J.

18 April, 2016.

Oral Order :-

Heard learned Counsel for the parties. Admit on the following substantial questions of law :-

- (i) Whether both the Courts were right in granting specific performance of the agreement dated 21 January 2006 entered into the parties inspite of specific notice issued by the Appellant below Exhibit 82 and in the facts and circumstances of the case ?

(ii) Whether both the Courts were right in allowing the variance in the agreement dated 21 January 2016 by accepting the theory of oral agreement advanced by the Respondent as regard condition of removal of a dilapidated structure ?

2. Taken up for final disposal by consent of parties forthwith. Paper-book dispensed with.

3. The Suit was filed by the Respondent for specific performance of an agreement dated 21 January 2006. By this agreement the Appellant had agreed to sell the suit plot i.e. N.A. Plot No. 21 situated at Village Zodga, Taluka Malegaon, District Nasik. It is the case of the Respondent that the agreement to sell dated 21 January 2006 was executed in the presence of witnesses for consideration of Rs.2,50,000/-. It is the case of the Respondent that the Respondent paid an amount of Rs.70,000/- and balance was to be paid on the date of the execution of the sale deed. According to the Respondent, the Respondent obtained loan from the Co-operative Society and from sale proceeds of cotton generated the amount and paid the same to the Appellant in the presence of the witnesses. Since the Appellant refused to execute sale deed, the Suit was filed by the Respondent. It was also contended that the Appellant did not remain present in the Office of sub-Registrar, Malegaon for execution of the sale deed.

4. The Suit was contested by the Appellant by filing the written statement contending that the document produced by the Respondent was a forged document. He had left an amount of Rs.70,000/- in Appellant's house with a view to grab the suit property. It was denied that the Respondent had been to Malegaon to execute the agreement, and he was at his construction site during the entire day and therefore, he had written a letter to the Respondent denying the agreement. The Suit was tried by the learned Civil Judge, Junior Division, Malegaon. The learned Judge framed issues as regard the existence of the agreement readiness and willingness and also framed an additional issues whether the Appellant proved that the Respondent had executed the agreement dated 21 January 2006 by mis-representation and also an additional issue whether the Appellant had agreed to remove the old structure existing on the land before giving possession of the suit plot. The learned Civil Judge held that the Respondent had proved that the Respondent was entitled to specific performance of the agreement and that the Appellant could not prove that the agreement was a fraudulent document. The learned Judge also held that the Appellant had agreed to remove the dilapidated structure before handing over the possession. Accordingly, by Judgment and Decree dated 8 October 2014, the learned Judge decreed the suit and directed the Appellant to hand over possession of the suit plot as per the agreement and as per the oral agreement.

5. Appeal No. 139 of 2014 was filed by the Appellant in the District Court, Malegaon, which was dismissed by the learned District Judge by judgment and decree dated 4 April 2015. The learned District

Judge confirmed the findings as regard specific performance of the agreement. As regard the oral agreement, the learned District Judge hold that it was not of any consequence in view of the decree for specific performance already granted. Accordingly, the Appeal was dismissed by order dated 4 April 2015.

6. As regard the first question of law regarding the validity of the agreement is concerned, it is the case of the Appellant in the pleadings that the Appellant was not present when the agreement was executed. This postulates that the defence is that he has not signed any such document and the document should not exist. It is the case of the Appellant that notice below Exhibit 82 was issued to the Respondent within 7 days and also the money was sought to be returned. If the notice below Exhibit 82 is perused, it indicates that this notice is issued stating that the Appellant is not agreeable to a proposal of the sale of the plot. The subject matter of the letter is "cancellation of agreement". The letter then states that the proposal for sale of plot is not acceptable to the Appellant which should be treated as cancelled and he is returning Rs.70,000/-. It is specifically stated that the earlier agreement should be treated as cancelled. This is in complete variance with the defence that the Respondent was not at all present when the present agreement was signed. If that was a position, there was no need for cancellation of the agreement. Therefore, both the Courts have rightly drawn a conclusion that the Appellant failed to prove that the agreement was a fraudulent one. The Appellant, in fact, in the notice has accepted the existence of the agreement but has indicated that he had second thoughts regarding

the same but this is not the case pleaded by the Appellant. There is no error nor any perversity in drawing the conclusion as above by both the Courts based on notice below Exhibit 82. The arguments advanced by the learned Senior Advocate for the Appellant regarding the corrections carried out in the deed and the agreement being suspicious, cannot be accepted in view of the clear notice below Exhibit 82 given by the Appellant.

7. The learned Senior Advocate for the Appellant then addressed about the oral agreement. He submitted that it is not permissible to lead oral evidence in respect of the agreement which is in writing. He submitted that an oral evidence was sought to be led in complete variance and terms of the written agreement which is not permissible.

8. It is true that the learned Single Judge has not discussed the additional issue as regard the oral agreement and has granted decree as even for removal of the dilapidated structure. The learned District Judge however has dealt with the submission of the Appellant as regard the decree of removal of dilapidated structure holding that it is not much of the consequence, in view of the specific performance which is otherwise proved. The learned District Judge however has retained the decree as regard the direction to removal dilapidated structure. In my opinion, even though the theory of oral agreement for removal of dilapidated structure is to be kept aside, it will not affect the decree for specific performance of the agreement for sale. The oral agreement only seeks an additional relief which, rightly observed by the learned District Judge as

of not much of consequence as the Respondent can always after taking possession of the property and remove the dilapidated structure himself. However, even though that being the position, for lack of any discussion as regard the direction to remove dilapidated structure, this cannot remain part of the decree. The Appeal will have to be partly allowed by setting aside only the direction contained in the decree to the Appellant to remove the dilapidated structure. As regard the rest of the decree for specific performance and handing over possession of the suit plot, the same will have to be confirmed. Accordingly, the Appeal is disposed of by way of following order :-

(i) The judgment and decree dated 4 April 2015 passed by the learned Ad-hoc District Judge – 2, Malegaon in Civil Appeal No. 139 of 2014 and the judgment and decree dated 8 October 2014 passed by the learned Trial Court in Regular Civil Suit No. 51 of 2012 are confirmed with the following modification :-

- (a) The directions to the Appellant to remove the dilapidated structure is quashed and set aside.
- (b) Rest of the decree shall stand confirmed.

9. No order as to cost.

10. The Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)