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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1564 OF 2016
IN
SECOND APPEAL NO.675 OF 2016

WITH
CIVIL APPLICATION NO.1230 OF 2016
IN
SECOND APPEAL NO.675 OF 2016

WITH
SECOND APPEAL NO.675 OF 2016

Anusaya Dashrath Janvekar,	)	
Age : 66 Years, Occupation Household,	)	
R/O Ward No.9, House No.286,	)	
Sangali Road, Ichalkaranji,	)	...Applicant
Tal. Hatkanangale, District – Kolhapur	)	...Appellant
		Ori. Plaintiff

....Versus....

Shamrao Baburao Satale,	)	
Age : 50 years, Occupation Agriculturist &	)	
Business, R/O Wad No.9, House No.286	)	
Sangali Road, Ichalkaranji,	)	
Tal. Hatkanangale, District – Kolhapur	)	...Respondent
		Ori. Defendant

Mr.P.R. Arjunwadkar for the Applicant / Appellant.
Mr.Amit Gharate for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 26TH OCTOBER, 2016.

P.C. :-

1. By this appeal filed under section 100 of the Code of the Civil Procedure, 1908, the appellant (original plaintiff) has impugned

the judgment and decree dated 9th May, 2016 passed by the learned District Judge – 1, Ichalkaranji, District Kolhapur, dismissing Regular Civil Appeal No.45 of 2015 filed by the appellant. The appellant had impugned the judgment and decree dated 20th July, 2006 passed by the learned Civil Judge, Senior Division, Ichalkarani, District Kolhapur, dismissing Special Civil Suit No.246 of 2005, *inter-alia* praying for specific performance of the agreement to sell entered into between the parties. Some of the relevant facts for the purpose of deciding this appeal are as under :

2. The parties in this judgment are described as per their status in the trial Court proceedings. The defendant is the owner and possessor of Revisional Survey No.678, situated within the limit of Ichalkaranji Municipal Council. It was the case of the plaintiff that on 20th August, 2002, the plaintiff and the defendant entered into an agreement by which the defendant agreed to sell the suit property i.e. Southern side land having Eastern side 36 feet, Western side 36 feet, Southern side 89 feet 7 inch, Northern side 78.3 admeasuring 3024 sq. ft., 281 sq. mtr., H-O-2.81 R addressed at Rs.0-04 out of revision survey No.679 Hissa Kramank 1, admeasuring H-0-06.30 R addressed at Rs.0-75 paisa situated at Ichalkaranji, Tal. Hatkanangale, District Kolhapur, having boundaries at the rate of Rs.85/- per sq. ft. The defendant accepted a sum of Rs.50,000/- from

the plaintiff as an earnest amount on 20th August, 2002. It was the case of the plaintiff that the plaintiff made further payment on 26th September, 2002 and 18th October, 2002 in the sum of Rs.10,000/- each and on 31st October, 2002 a sum of Rs.5,000/- to the defendant under the said agreement to sell. Under the said agreement to sell, the sale transaction was to be completed within a period of six month.

3. It was the case of the plaintiff that the plaintiff and the defendant resided in the same locality and are neighbors and used to meet daily. The plaintiff used to ask the defendant as to when the defendant would accept the money and execute the sale deed. The defendant had agreed that the land being the agricultural land and as there was restriction on the transaction of sale especially because of a notification of Gunthewari, the permission of the authority was required before execution of the sale deed. It was the case of the plaintiff that the defendant had agreed to obtain appropriate permission for transfer of the suit property from the authority. The defendant had informed the plaintiff on many occasions that he had applied for permission from the competent authority for execution of the sale deed and he would execute the sale deed after obtaining such permission.

4. On 17th March, 2003, the defendant through his advocate issued a notice, terminating the said agreement to sell on the ground

that the plaintiff had not performed her part of obligations within the time prescribed under the said agreement to sell. The plaintiff replied to the said notice dated 17th March, 2003 through her advocate on 24th March, 2003 and denied the allegations made therein and demanded specific performance of the said agreement to sell.

5. On 24th March, 2003, the plaintiff published a notice in daily "Mahasakata" in respect of the transaction between the plaintiff and the defendant and the members of the public not to deal with the suit property. It was the case of the plaintiff that the defendant however, started cutting the trees in the suit property and started making an attempts to alienate the suit property.

6. The plaintiff therefore, filed a suit immediately *inter-alia* praying for specific performance of the agreement to sell against the defendant. The suit was resisted by the defendant by filing the written statement. The plaintiff also filed an application for interim relief. The defendant filed a reply to the said interim application and thereafter filed a Pursis thereby adopting the affidavit in reply as his written statement. It was contended by the defendant that the plaintiff had to get the sale deed executed of the suit property within six months from the date of the execution of the agreement to sell by paying the balance consideration. The plaintiff however, deliberately avoided to get the sale deed executed within the time prescribed. It was the case

of the defendant that the plaintiff also failed to comply with various important terms of the agreement to sell within six months or even after expiry of six months. It was the case of the defendant that the plaintiff was never ready and willing to perform her part of contract. In the written statement, the defendant denied receipt of Rs.25,000/- alleged to have been paid by the plaintiff after execution of the agreement to sell.

7. Learned trial Judge framed 10 issues for determination. Both the parties adduced their respective oral as well as documentary evidence in the said suit before the learned trial Judge. The plaintiff examined herself and one Ramesh Bhartiya and his grand-son Rahul Janvekar as her witness. The defendant examined himself . Both the parties produced various documents before the learned trial Judge.

8. The learned trial Judge passed a judgment and decree dated 20th July, 2006, thereby dismissing the Special Civil Suit No.246 of 2005 filed by the plaintiff. The learned trial Judge however, directed the defendant to repay the earnest amount of Rs.50,000/- to the plaintiff within two months and to pay interest at simple rate of 9% p.a. if the said amount of Rs.50,000/- was not paid within two months.

9. Being aggrieved by the said judgment and decree dated 20th July, 2006 passed by the learned trial Judge, the plaintiff filed an appeal (Regular Civil Appeal No.45 of 2015) before the learned

District Judge – 1, Ichalkaranji, District Kolhapur. The learned District Judge – 1, Ichalkaranji, District Kolhapur framed nine points for determination. By a judgment and decree dated 9th May, 2016, the learned District Judge -1, Ichalkaranji, District Kolhapur dismissed the said Regular Civil Appeal No.45 of 2015, filed by the plaintiff. Being aggrieved by the said judgment and decree passed by the first appellate Court, the plaintiff filed this second appeal under section 100 of the Code of Civil Procedure, 1908.

10. The plaintiff has filed Civil Application (1564 of 2016) in this second appeal under Order 41 Rule 27 of the Code of Civil Procedure, 1908, *inter-alia* praying for permission to produce additional evidence annexed to the said civil application. The plaintiff has also filed a separate Civil Application bearing No.1230 of 2016 *inter-alia* praying for injunction restraining the defendant from creating any third party rights or to alienate and/or transfer the suit property or make any construction on the suit property.

11. Learned counsel appearing for the plaintiff invited my attention to the agreement to sell entered into between the parties and various documents annexed to the Civil Application No.1564 of 2016. It is submitted by the learned counsel that there was a dispute raised before the learned trial Judge that the suit property could not be transferred unless the permission under Gunthe Wari notification

was obtained and the defendant had avoided to apply and to get the permission from the competent authority to transfer the suit property in favour of the plaintiff. He submits that the defendant on the other hand had denied that any such permission from the competent authority under the said Gunthewari notification was required to be obtained by the defendant for seeking permission to transfer the property in favour of the plaintiff.

12. It is submitted by the learned counsel for the plaintiff that the defendant himself had applied for permission of the competent authority under the said Gunthewari notification during the pendency of the first appeal and had applied for such permission on 8th March, 2013 and had received such permission on 2nd November, 2013. He submits that the defendant had applied on 29th November, 2013 to Ichalkaranji Municipal Council for permission to construct on the suit property on the ground that the suit property had been converted under Gunthewari scheme and had annexed the copy of the certificate to that effect. On 24th June, 2014, Ichalkaranji Municipal Council had granted permission to the defendant to carry on construction on the suit plot. It is submitted that when Ichalkaranji Municipal Council came to know about the fraud committed by the defendant, the Ichalkaranji Municipal Council cancelled the said permission and initiated a criminal action against the defendant by

registering a complaint with the concerned police station on 7th November, 2015.

13. It is submitted by the learned counsel for the plaintiff that the time was not an essence of contract. He submits that the learned trial Judge rendered a finding that though the time was not an essence of contract, the plaintiff however, was not entitled to ask for specific performance as she was not ready and willing to perform her part of contract. He submits that though there was no specific provision in the agreement to sell entered into between the parties that prior permission of the competent authority under the Gunthe Wari notification was to be obtained by the defendant, it is not in dispute that such prior permission was mandatory before execution of the sale deed. It is submitted that the balance consideration payable by the plaintiff to the defendant was dependent upon the defendant obtaining such prior permission from the competent authority. He submits that admittedly the defendant did not apply for such permission before expiry of six months. The balance consideration was also payable upon the measurement of the suit property being taken by the defendant. He submits that the defendant neither got carried out the measurement of the suit property for the purpose of payment of the balance consideration nor applied for permission of the competent authority without which the sale deed could not have

been executed.

14. it is submitted by the learned counsel that admittedly the defendant had applied for permission of the competent authority under the said Gunthe Wari notification and thus it could not be disputed by the defendant that no such permission was required to be obtained before execution of the sale deed. He submits that all the statutory obligations of the parties have to be complied with even if the same are not specifically recorded in the agreement to sell.

15. It is submitted by the learned counsel for the defendant that within seven months of the execution of the said agreement to sell, the plaintiff issued a notice raising false issues and illegally terminated the suit agreement to sell. The defendant responded to the said notice and denied the allegations made therein and had called upon the plaintiff for specific performance of the agreement to sell. Since the plaintiff did not execute the sale deed in favour of the defendant, the plaintiff filed a suit for specific performance of the sale immediately.

16. It is submitted by the learned counsel for the plaintiff that the plaintiff was all through out ready and willing to comply with her part of the agreement and had not committed any breaches. He submits that the findings rendered by the two Courts below are totally perverse and thus though the findings are concurrent findings, the

same can be interfered with by this Court under section 100 of the Code of Civil Procedure, 1908.

17. Insofar as reliance on the additional documents annexed to the civil application are concerned, it is submitted by the learned counsel for the plaintiff that the said documents came into existence in the year 2014-2015 and 2016 in the record of Ichalkaranji Municipal Council which came to the knowledge of the plaintiff recently when the plaintiff filed this appeal before this Court. He submits that those documents are in respect of the suit property and it is the Gunthe Wari proposal made by the defendant during the pendency of the appeal filed by the plaintiff before the first appellate Court. The defendant had not disclosed these facts before the learned trial Judge. He submits that these additional documents are required to be produced before this Court and the same are necessary for proper adjudication of the dispute. He submits that there is no intentional delay in not producing these documents before the learned trial Judge or before the first appellate Court.

18. It is submitted by the learned counsel for the plaintiff that the fact that the defendant had subsequently applied for permission of the competent authority under the said Gunthewari notification in respect of the suit property, the plaintiff could not dispute that no such permission was required.

19. It is submitted by the learned counsel for the plaintiff that the defendant has not filed any affidavit in reply to the application filed by the plaintiff under Order 41 Rule 27 of the Code of Civil Procedure, 1908. He submits that in the civil application, the plaintiff has annexed the Government notification as well as various documents executed by the defendant himself for seeking permission for the development under section 44 of the M.R.T.P. Act, for making an application for permission under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 to the authority in respect the same plot and which documents are not disputed by the defendant even in these proceedings.

20. It is submitted that since the defendant himself had applied for necessary permission under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001, the defendant could not have taken a stand before the learned trial Judge that no such permission under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 before execution of the sale deed was necessary. He submits that both the Courts below have proceeded on the premise that no such permission was required to be obtained from the authority under the provisions of the

Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 before execution of the sale deed. He submits that the documents which are now made available to the plaintiff, which are annexed to the civil application would clearly indicate that the stand taken by the defendant before the learned trial Judge as well as before the first appellate Court that no such permission was required to be obtained was *ex-facie* false and incorrect. It is submitted that the learned trial Judge had rendered a finding that the time was not an essence of contract. Though the defendant had not filed any cross-objection in the appeal filed by the plaintiff before the first appellate Court, the first appellate Court reversed the said findings rendered by the learned trial Judge which was not permissible in law. He submits that even otherwise, the first appellate Court has rendered such finding contrary to law laid down by the Supreme Court in various judgments, which were referred to and relied upon by the learned trial Judge in his judgment.

21. Learned counsel appearing for the plaintiff placed reliance on the judgment of the Supreme Court in case of **Shyamal Kumar Roy vs. Sushil Kumar Agarwal, (2006) 11 SCC 331** and in particular paragraphs 12, 20 and 22 and would submit that the vouchers acknowledging further payment of consideration produced by the plaintiff were already marked as exhibits when the same were

tendered by the witness examined by the plaintiff and thus no objection in respect of such documents could be raised by the defendant at the stage of argument.

22. Learned counsel for the plaintiff placed reliance on the judgment of the Supreme Court in case of **Jatinder Singh & Anr. vs. Mehar Singh & Ors., (2009) 17 SCC 465** and would submit that before this Court besides whether this appeal filed by the plaintiff involves substantial question of law or not, this Court is required to decide the civil application filed by the plaintiff under Order 41 Rule 27 of the Code of Civil Procedure, 1908 and the issue as to whether the additional evidence sought to be produced by the plaintiff can be allowed to be produced at this stage or not. Learned counsel for one of the party also placed reliance on the judgment of the Supreme Court in case of **Jabalpur Development Authority vs. V.V. Shrivastava & Anr., (2010) 13 SCC 84** and in particular paragraph 13 in support of his submission that this Court is required to decide the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 for producing additional evidence before deciding whether the second appeal involves substantial question of law under section 100 of the Code of Civil Procedure, 1908 or not.

23. Learned counsel for the defendant on the other hand addressed this Court on various issues, including the issue about

interference with the findings rendered by the learned trial Judge as well as the first appellate Court being concurrent, the issue as to whether the time was an essence of contract or not, whether the permission of the authority under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 was required to be obtained or not. Learned counsel also addressed this Court on the issue as to whether the civil application filed by the plaintiff under Order 41 Rule 27 of the Code of Civil Procedure, 1908 shall be entertained by this Court at this stage or not.

24. In view of the fact that the plaintiff has filed an application under Order 41 Rule 27 of the Code of Civil Procedure, 1908, *inter-alia* praying for permission to rely upon the additional evidence at this stage, this Court will have to first decide whether the plaintiff has made out a case for production of additional evidence under Order 41 Rule 27 of the Code of Civil Procedure, 1908 or not before deciding as to whether any substantial question of law is involved in this second appeal filed by the plaintiff or not.

25. A perusal of the impugned judgment and decree passed by the learned trial Judge on 20th July, 2006 indicates that the learned trial Judge had framed issue no.5 i.e. as to whether the plaintiff had proved that it was for the defendant to obtain necessary permission

for sale from the competent authority or not. A perusal of the finding rendered by the learned trial Judge on this issue indicates that it was the plea of the defendant that the agreement to sell executed between the plaintiff and the defendant was silent on the part of the requirement of prior permission of competent authority before executing the sale deed of the suit land. The defendant had also pleaded that no such permission was required to be obtained from the competent authority before executing any sale deed of the suit land in favour of the plaintiff. Learned trial Judge accepted the said plea of the defendant and answered the said issue in negative.

26. A perusal of the impugned judgment and decree passed by the first appellate Court rendered on 9th May, 2016 indicates that the first appellate Court had formulated point no.3 i.e. "Does the plaintiff prove that the defendant was required to obtain necessary permission for sale of the suit property from the competent authority ?" and has answered the same point in negative. A perusal of the said judgment and decree indicates that the first appellate Court also has rendered a finding that the agreement to sell indicates that no condition was imposed on the defendant to secure any permission from the authority under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 was required. It is held that if there was any

such condition to be fulfilled or if there was any such restriction in execution of the sale deed without such prior permission, in that event the said condition ought to have to be included in the agreement to sell which did not appear in the present matter.

27. A perusal of the civil application filed by the plaintiff further indicates that the plaintiff had produced a copy of the notification and several documents and correspondence between the defendant and the Government showing the application made by the defendant for obtaining such prior permission, the permission granted by the authority etc. The defendant has not filed any affidavit in reply in this civil application.

28. It is urged by the learned counsel for the defendant that the Government notification under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 was already in force when the agreement to sell was entered into between the parties and during the pendency of the suit filed by the plaintiff. He submits that ignorance of law is no excuse and thus the plaintiff not having produced the said Government notification before the learned trial Judge, cannot be now allowed to produce such notification and subsequent documents and the correspondence exchanged by and between the defendant and the competent authority. In support of this submission, the learned

counsel for the defendant placed reliance on the judgment of the Supreme Court in case of **Basayya I. Mathad vs. Rudrayya S. Mathad, AIR 2008 SC 1108** and in particular paragraph 8. He submits that the plaintiff has not made out a case under Order 41 Rule 27 of the Code of Civil Procedure, 1908 for granting permission to produce the additional evidence at this stage.

29. Learned counsel for the plaintiff in re-joinder on this issue submits that the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 prescribes the procedure for seeking permission to produce additional evidence on various grounds which is for advancement of justice. He submits that the defendant has not disputed even before this Court that he had applied for permission to the competent authority under the provisions of Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 and had been granted such permission by the authority. He submits that for production of the additional evidence prayed by the plaintiff is in compliance with the conditions prescribed under Order 41 Rule 27 of the Code of Civil Procedure, 1908.

30. At this stage though both the parties have advanced various submissions on merits of the matter, including on the issue whether any substantial question of law arises in this appeal or not, in view of the principles laid down by the Supreme Court in case of

Jatinder Singh & Another (supra), I shall first deal with the said application filed by the plaintiff before deciding the question whether any substantial question of law arises in this appeal or not.

31. Upon raising query to the learned counsel for the defendant whether any such prior permission from the competent authority under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 was necessary or not before execution of the sale deed when the agreement to sell was entered into between the plaintiff and defendant and whether the defendant had subsequently applied for such permission under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 or not, the learned counsel for the defendant agreed that such permission was necessary before executing any sale deed and that his client had applied for such permission under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 during the pendency of the appeal.

32. Learned counsel however, led emphasis on the issue that no such condition was part of the agreement to sell entered into between the parties and thus the defendant was not required to obtain such permission. The defendant has admittedly not filed any

reply to the civil application filed by the plaintiff for production of additional evidence which comprises of Government notification and various applications / documents and the correspondence exchanged between the defendant and the competent authority regarding the permission under the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001. The defendant has not disputed these documents before this Court.

33. In my view, in these circumstances, it is clear that the statement made by the defendant before the learned trial Judge that no such permission was required to be obtained from the competent authority before execution of the sale deed was factually incorrect and contrary to the provisions of the Maharashtra Gunthewari Development (Regularization, Upgradation and Control) Act, 2001 and the notification issued by the Government. It is clear that both the Courts below have rejected the said plea raised by the plaintiff on the ground that the plaintiff had failed to prove that any such permission was required to be obtained from the competent authority before execution of the sale deed.

34. In my view, even if the agreement to sell did not provide for any such obligation on the part of either party to obtain prior permission of the authority before execution of the sale deed, the defendant being the Vendor of the suit property was bound to

transfer the lawful title in respect of the suit property in favour of the plaintiff. The defendant thus could not raise such plea that since no such obligation was specifically recorded in the agreement to sell, the defendant was not under an obligation to obtain such permission from the competent authority prior to execution of the sale deed.

35. The Supreme Court in case of **Jabalpur Development Authority** (supra) had considered the situation that the parties had exchanged the correspondence after the judgment of the trial Court, lower appellate Court and the High Court and apparently conflicting communication had been issued by the functionary of the Government and the appellant therein. The Supreme Court after considering such facts in hand was pleased to set aside the order passed by the High Court with a direction that the second appeal filed by the appellant to decide afresh after giving an opportunity of hearing to the parties. The Supreme Court also permitted the parties to file the applications under Order 41 Rule 27 of the Code of Civil Procedure, 1908 for permission to adduce additional evidence. In my view, the principles laid down by the Supreme Court in case of **Jabalpur Development Authority** (supra) applies to the facts of this case. In this case also, additional evidence sought to be produced by the plaintiff at this stage and the statement made by the learned counsel for the defendant that such permission was required to be

obtained before execution of the sale deed and in view of the defendant not disputing the documents relied upon by the plaintiff at this stage, the plaintiff has made out a case for grant of permission to produce these additional evidence which would be necessary to enable this Court to pronounce the judgment. In my view, the plaintiff has made out a case for production of additional evidence not only under Order 41 Rule 27 (aa) but also under Order 41 Rule 27 (b) of the Code of Civil Procedure, 1908.

36. Insofar as the other issues raised by both the parties are concerned, the same can be considered by this Court after an opportunity is given to both the parties to deal with these additional evidence which are allowed to be produced by this order.

37. I therefore, pass the following order :-

- a). Civil Application No.1564 of 2016 is allowed in terms of prayer clause (a).
- b). Place Second Appeal No.675 of 2016 along with Civil Application No.1230 of 2016 on board for admission on 5th December, 2016.
- c). Ad-interim order passed by this Court to continue till next date.

(R.D. DHANUKA, J.)