

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 358 OF 2014

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| 1. | Bhagwat s/o Barsu Chaudhari
Age-75 years, Occu. Agril., | |
| 2. | Smt. Sudha w/o Anil Agrawal,
Age-58 years, Occu. Household,

Both R/o Bhavani Peth, Jalgaon,
District Jalgaon | .. Appellants /
(Original Plaintiffs) |
| <i>versus</i> | | |
| 1. | Atmaram s/o Tukaram Patil,
Age – major, Occu. Agril., | |
| 2. | Vishwas S/o Tukaram Patil,
Age-Major, Occ. Agril. | |
| 3. | Gopal S/o Tukaram Patil,
Age-Major, Occ. Agril.,
All r/o Khedi Bk., Tq &
District – Jalgaon | .. Respondents/
(Orig. Defendants) |

Mr. V. J. Dixit, Senior advocate instructed by Mr. L. V. Sangeet, Advocate for appellants

Mr. A. J. Patil, Advocate holding for Mr. Kunal Kale, Advocate for respondents

CORAM : SUNIL P. DESHMUKH, J.

DATE : 5th April, 2017

ORAL JUDGMENT :

1. Heard learned senior advocate Mr. V. J. Dixit appearing on behalf of the appellants – original plaintiffs and learned

advocate Mr. A. J. Patil holding for learned advocate Mr. Kunal Kale appearing on behalf of respondents–original defendants.

2. The appellants – plaintiffs instituted special civil suit bearing No. 158 of 2004 before the Civil Judge, Junior Division, Jalgaon, seeking specific performance of agreement of sale dated 08-01-1982 in respect of suit property more particularly referred to in the plaint and in the alternative, claimed refund of amount paid pursuant to the terms of the agreement with respondents'-defendants' predecessor.

3. It is the case of the plaintiff that one Tukaram Hari Patil – predecessor of the defendants had agreed to sell a piece of land ad-measuring 1 hectare, 51 aar from survey no. 55/2A situated in village Khedi Budruk in taluka and district Jalgaon to plaintiff no. 1 and Anil Agrawal-husband of plaintiff no. 2 for a consideration of Rs.3,80,000/- . On the date of agreement for sale, an amount of Rs.1,00,000/- had been paid to said Tukaram. Subsequently, an amount of Rs.5,000/- was also paid to Tukaram on 04-08-1983.

4. According to the plaintiffs, one of the terms of the agreement had been that in the case of acquisition of the land

under the agreement before execution of sale deed, the agreement shall stand cancelled and earnest amount of Rs.1,00,000/- paid was liable to be returned to the plaintiffs. The term had been an important term of the agreement.

5. A notification had been issued by the State authorities in 1985, intending to acquire lands comprising the piece of land under the agreement of sale. Around 1992, another notification came to be issued declaring the land being required for public purpose.

6. According to the plaintiffs, despite aforesaid, plaintiff no.1 and husband of plaintiff no. 2 were ready and willing to perform their part of agreement and even after death of plaintiff no. 2's husband, she had also been ready and willing to perform her part under the agreement of sale. However, as the land acquisition proceedings were initiated execution of sale deed had been getting prolonged.

7. Subsequently, after sometime, due to efforts of plaintiffs, the land had been released from acquisition. However, the defendants had been delaying and avoiding execution of sale deed and as such a notice had been issued

by plaintiffs through their advocate on 03-10-2003 for execution of sale deed in accordance with terms of agreement of sale. The notice was responded to by defendants with false and mischievous reply, denying and declining the request under the notice.

8. Tukaram in the meanwhile had died and as such suit for specific performance had been brought against his heirs, alternatively praying for refund of Rs.1,05,000/- along with interest at the rate of 24 per cent per annum.

9. The defendants purportedly declined execution of sale by their father on 08-01-1982 as also receipt by him of earnest amount of Rs.1,00,000/-. They have denied that a further amount of Rs.5,000/- had been received by Tukaram towards part consideration. The defendants claimed that suit property was their ancestral property and that they had share in the suit property which fact, according to them, had been known even to Tukaram. It is further contended that since 1982 upto the death of Tukaram the plaintiffs had never prosecuted their claim for specific performance. The proceedings have been initiated with a view to harass the defendants. They have further denied that acquisition

proceedings initiated by the State had delayed execution of sale deed. Notice issued by plaintiffs is claimed to be false and has been fittingly replied.

10. Upon pleadings, issues were framed with regard to execution of agreement of sale and receipt of earnest amount of Rs.1,00,000/- as well as Rs.5,000/- by the trial court. The court found that there had been execution of agreement of sale and receipt of earnest amount of Rs.1,00,000/- and Rs.5,000/- by Tukaram. Contention of plaintiffs about Tukaram having executed agreement of sale by accepting earnest amount of Rs.1,00,000/- has been accepted by the court. The suit, however, had been held to be outside the period of limitation. The court also found that the plaintiffs were not ready and willing to perform their part of the contract and further held that the plaintiffs were not entitled to specific performance of contract. The trial court also decided against plaintiffs their claim for refund of amount paid. The trial court as such dismissed the suit.

11. The matter was taken in appeal by the plaintiffs under regular civil appeal no. 910 of 2012. The appellate court had framed points for determination as to whether the plaintiffs

were ready and willing to perform their part of the contract and whether the suit is in limitation and answered the same in the negative. The matter had been discussed on these two points on facts and evidence.

12. The appellate court found that the plaintiffs had been reluctant to disclose the date of death of Tukaram which was 13-02-2000 and had referred to the same only in the notice. Anil Agrawal-husband of plaintiff no. 2 had died around 1998. The plaintiffs even after aforesaid deaths had been unmoved and had not done anything in furtherance of the agreement despite agreement refers to stipulation of eight months from its' date for sale deed to be executed. The appellate court further has referred to and quoted term no. 3 of the agreement wherein it has been stated that the sale deed was to be executed within eight months at the expenses of proposed vendees and that said term had been an important term. The court considered that for a long time after the period agreed under the agreement had been over, no movement had been made on the part of the proposed vendees i.e. the plaintiffs for performance of their part of the agreement. No notice had ever been issued by agreement

holders after its' execution during life time of Anil Agrawal or for that matter Tukaram Patil. The agreement refers to that if the land is subjected to acquisition by government, the agreement would stand cancelled and the proposed purchasers would be entitled to refund of earnest money whereas plaintiffs' witness shows ignorance of said term though on the other hand plaintiffs refer to the terms embodied in the agreement. Nothing has been placed on record about cancellation of the notification for acquisition of land. The argument that in view of cancellation of notification for acquisition of land the suit agreement would revive does not find place in the terms and conditions embodied in the agreement. The plaintiffs had not paid balance consideration. On all the relevant events as on completion of eight months from the date of agreement or after death of Anil Agrawal or for that matter of Tukaram Patil there had been no movement by plaintiffs for performance of their part of the contract.

13. As such, appellate court considered that the plaintiffs have been not able to prove that they had always been willing and ready to perform their part of contract. Since 1982 till the suit had been instituted in 2004 for specific performance no

efforts had ever been made by plaintiffs' for completion of contract. They were aware of the acquisition proceedings as can be gathered from material on record and in the circumstances, the suit cannot be said to be within the period of limitation.

14. Learned senior counsel Mr. Dixit appearing on behalf of the plaintiffs submits that the findings by trial as well as appellate court in respect of two points viz; readiness and willingness of plaintiffs and suit being within limitation cannot be said to be sound findings on facts and in law. He submits that although the period of execution of sale deed in agreement refers to eight months, payment of Rs.5,000/- had been accepted afterwards. As such, it cannot be said that stipulation regarding time had been an important stipulation and in the circumstances, while land acquisition proceedings had been cancelled in respect of subject land the matter stood revived for specific performance and as such, a notice had been given to reluctant vendors to which a misleading reply had been sent.

15. He submits, the courts found though the defendants purportedly denied the execution of agreement of sale, the

agreement was proved to have been duly executed and amount having been paid, and having regard to intervening circumstances from 1985 till 2003 whereunder acquisition proceedings initiated in 1985 have been cancelled in 2003, suit ought to have been decreed. He submits that on cancellation of acquisition proceedings, as a natural corollary and effect, the agreement stood revived. The suit in 2004 after cancellation of acquisition proceedings in 2003 is well within limitation, as also ascertainable period can be said to have been stipulated for execution. Conduct of the parties shows, time stipulation had not been an important stipulation. As soon as cloud of land acquisition vanished, money had been offered to be paid and as such the plaintiffs are entitled to execution of sale deed.

16. Learned counsel for defendants- respondents Mr. A. J. Patil submits that there is no substance in the submissions on behalf of the plaintiffs – appellants. Both the courts are concurrent on findings of facts and law. The second appeal does not give rise to any question, much less a substantial question of law which requires consideration. He submits, the plaintiffs had not been ready and willing to perform their

part of the alleged contract and suit is not within limitation which are the findings based on the facts of the case and decided on evidence by the two courts. As such, these findings are not amenable to be reopened in the second appeal for consideration.

17. Having heard learned counsel, the position emerges that it is not the case of the plaintiffs that any time after 1983 till 2003 there had been any movement by them to fulfill their obligation to perform their part of the agreement. The amount of Rs.5,000/-, according to their own case, had been paid in 1983. Thereafter there had been no steps taken to have execution of the agreement till Tukaram had been alive nor after Anil Agrawal – husband of plaintiff no. 2 had died in 1998. The land was declared to be required for public purpose in 1992 while the acquisition proceedings were mooted since 1985. Contract was subject to acquisition proceedings. Even if it is assumed that those would not tantamount to acquisition, in such case, the agreement would not be deemed to be cancelled but during this period there had been no movement by plaintiffs till acquisition had been cancelled i.e. from 1985 to 2003 to fulfill their

obligations under the agreement of sale. If the term as is considered that upon acquisition, agreement would stand cancelled, in such a case cancellation of the agreement without there being stipulation about revival of contract on cancellation of acquisition proceedings, it is not possible to consider the claim of the appellants.

18. Both the courts, as such, have taken a view based on facts and evidence on record which is a possible view. Therefore, an argument against such decisions that other view is possible is not sufficient to interfere with and overturn the decisions so far concurrently rendered by two courts. It is not the case that the decisions can be said to be perverse.

19. The second appeal, as such, does not give rise to any substantial question of law. The same stands accordingly dismissed.

SUNIL P. DESHMUKH
JUDGE

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