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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

SECOND APPEAL NO.693/2016

Smt.Suman w/o Bhaskar Gadkar,
age 67 yrs., occu.household,
r/o Adjacent to Sadhana Housing
Society, Savedi, Ahmednagar.
...Appellant..
(Org.defendant)

Versus

Chetan s/o Popatlal Bhalgat,
age 37 yrs., occu.business,
r/o Fulari Mala, Savedi,
Ahmednagar. Dist.Ahmednagar.
...Respondent...
(Org.plaintiff)

.....
Shri Arvind G. Ambetkar, Advocate for appellant.
Shri R.S. Deshmukh, Advocate for respondent.
.....

CORAM: SUNIL P. DESHMUKH, J.

DATE: 28.02.2017

ORAL JUDGMENT :

- 1] Heard learned counsel for the parties.
- 2] The defendant in Special Civil Suit No.156/2010 is before this Court challenging decree of specific

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performance granted by trial Court on 28.8.2014, which is confirmed by the appellate Court in Regular Civil Appeal No.405/2014 under its judgment and order dated 26.2.2016.

3] Succinct reference to the case pleaded by the plaintiff – respondent in the second appeal and the defendant – appellant in the second appeal, would facilitate appreciation of the matter in its proper perspective. Parties hereto are referred to by their status in Regular Civil Suit No.156/2010.

4] The suit property admeasuring about 193.90 Sq.Mtrs., a part of plot No.4 totally admeasuring 697.95 Sq.Mtrs. under an allotment on partition had been with appellant – defendant. The property is more particularly described in the plaint.

5] The defendant had agreed to sell the property for consideration of Rs.10,00,000/- under a written agreement dated 11.1.2010 and an earnest amount of Rs.1,00,000/- had been paid. The agreement had been signed by the plaintiff as well as the defendant alongwith three attesting witnesses including the son of the defendant.

6] Pursuant to the terms of agreement, the defendant was to bear the responsibility of payment of Municipal

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taxes as well as the defendant was supposed to carry out measurement of suit property. However, aforesaid terms were not being complied with constraining the plaintiff to discharge the tax burden of the Municipal Corporation.

7] In furtherance of the agreement, the plaintiff had issued a proclamation in the newspaper calling objections. The sale deed was to be executed within a period of two months from the date of execution of the agreement of sale. The defendant's reluctance to go ahead with the agreement, compelled the plaintiff to issue notice dated 30.3.2010 requesting execution of sale deed pursuant to the agreement. Despite notice having been issued on proper address and having been received by defendant, the request thereunder had not been responded to.

8] The brother of defendant namely Dasharath Baburao Gadkar had also intended to sell his share to the plaintiff. While the agreements of sale were respectively executed by brother and defendant, the brother has honored the commitment, whereas the defendant purported to resile from the agreement. In the circumstances, the suit ensued.

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9] The defendant contested the suit. She denied the allegations *inter-alia* execution of agreement of sale dated 11.1.2010, receipt of earnest amount of Rs.1,00,000/- and denied the receipt of notice dated 30.3.2010. The defendant contended that she is an old and an illiterate lady. The property is ancestral and has not been partitioned by metes and bounds, albeit the user had been separate. The defendant had constructed five rooms over the land and had taken electricity connection to the same and had dug a bore-well and she had no alternate accommodation except the suit property. She was not in any financial need to sell the property. It is contended by the defendant that signatures and thumb impressions of the defendant and her family members were obtained by the plaintiff on blank papers and had also obtained their photographs and the documents have been mis-used and a false agreement of sale in respect of the suit property has been prepared.

10] Additionally, it has been contended that the defendant alongwith family members had executed a Power of Attorney dated 13.3.2008 in respect of Plot Nos.115 and 11-A in favour of the plaintiff. Pursuant to the

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same, the plaintiff had received certain amount and he had handed over cheques of Rs.2,90,000/- to the defendant and her family members and some of the cheques were dishonored. It is during this period, the blank documents were got signed and thumb impressions were obtained which have been mis-used. A false sale deed has been executed in favour of the plaintiff's brother without consent of the defendant and her family members on the basis of Power of Attorney. The transactions by the plaintiff have been challenged by the defendant and her family members. Since the defendant had taken a leading role in the same, the plaintiff has instituted the present proceedings for specific performance.

7] With reference to aforesaid pleadings, issues for determination were framed by trial Court as to whether the defendant had executed the agreement of sale and whether Rs.1,00,000/- had been paid to the defendant by way of earnest amount and whether the plaintiff is ready and willing to perform his part of contract and whether he is entitled to the relief sought.

8] The appellate Court apart from points for determination to aforesaid effect had additionally framed

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an issue as to whether the defendant could prove that plaintiff has played fraud and has obtained her photographs and thumb impressions on blank paper and mis-used the same.

9] Both the Courts after taking a stock of the pleadings and the evidence, have found that the agreement of sale dated 11.1.2010 to have been duly proved by the plaintiff. The attesting witnesses of said document had been examined, who had proved the same. Apart from that, though the document had been signed by son of the defendant, however, to dispel the evidence, the defendant had not examined the son. The Courts have found that the plaintiff's evidence had been corroborated by Ganesh Lavale (PW3) and Mayur Tathe (PW4) and that Ganesh Lavale had been an attesting witness and Mayur Tathe had supported and corroborated the evidence of the plaintiff and the Courts further found that the veracity of their evidence was not damaged in the cross-examination. Whereas the evidence by the defendant has revealed that the suit property is acquired from maternal ancestor and the property had been subdivided and the sharers were enjoying their respective portions absolutely separately.

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10] The Courts have also appreciated that so far as the contention of practising fraud in obtaining photographs and thumb impressions is concerned, except bare words of the defendant, there is nothing placed on record supporting and corroborating her version. Both the Courts for want of material, considered that the dispute with regard to certain other properties would not put the agreement entered into between the plaintiff and the defendant under any cloud. The Courts have considered that the plaintiff has sufficiently brought on record the amount paid by him way of earnest money, has been invested in fixed deposits by the defendant in a Pat Sanstha. Looking at the date of the agreement and the date of making deposits and further that the defendant had not given account of the said amounts and source from where that had come to her, the Courts found substance in the case pleaded by the plaintiff. The Courts further had adverted to the circumstances that the plaintiff having issued proclamation, having paid taxes and having issued notice, have considered that the evidence sufficiently brings out that the plaintiff had been ready and willing to perform his part of the contract.

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11] The learned counsel for the appellant tries to contend that it cannot be said that the plaintiff has brought forth readiness and willingness as required for grant of discretionary relief of specific performance of contract. He purports to rely on a judgment in the case of *Kunda Khemraj Choudhary (Dr.) v. Mathurabai Mahadu Jadhav & others* (2015 (6) **Bombay Cases Reporter** 332) and purports to advert to paragraph no.19 of the same to contend that the pleadings may not show the readiness and willingness. The observations in paragraph 19 of the same appear to be in the background and circumstances of that case which can hardly be applied to the present matter and it does not appear that can be related to present case.

12] The learned counsel for the respondent points out the averments in paragraph nos.5 and 6 of the written statement submitting that those specifically refer to readiness and willingness of the plaintiff. That apart, he contends that the tenor of the plaint will have to be given regard to judge the readiness and willingness and according to him, the plaint shows the complete readiness and willingness on all counts.

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13] Taking into account that the Courts have been concurrent on the findings given on issues and additionally the appellate Court having found that the defendant has not discharged her burden about the agreement had been brought about by practising fraud and having regard to the pleadings particularly in paragraph nos.5 and 6 of the written statement, it does not appear that the submissions advanced on behalf of the appellant by the learned counsel would be able to infuse any life in the present second appeal. The second appeal does not appear to raise any substantial question of law on any count. The same as such stands dismissed. Consequently, Civil Application No.12086/2016 does not survive and also stands dismissed. There shall be no order as to costs.

(SUNIL P. DESHMUKH, J.)