

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**935. SECOND APPEAL NO. 541 OF 2017
WITH
CIVIL APPLICATION NO. 10559 OF 2017
IN
SECOND APPEAL NO. 541 OF 2017**

Kumudini W/o Atyanand Dhillpe,
age 65 years occupation Pensioner
R/o Shiv Nagar, old Jalna Taluka and Dist. Jalna.

...APPELLANT.

VERSUS

Ramprasad S/o Lalitprasad Jaiswal,
age 35 years occupation agriculture and business
R/o near Hanuman and Ganapati Mandir,
Shiv Nagar, old Jalna Taluka and Dist. Jalna.

Mrs. Sangeeta Tambat-Dhumal & Mr M. G. Deokate, Advocates for
Appellant.

Mr S. P. Shah & Mr S. M. Deshpande, Advocates for respondent sole.

CORAM : NITIN W. SAMBRE, J.

DATE :20th September, 2017

ORAL ORDER :

The appellant, owner of the suit property, entered into an agreement of sale vide Exh. 20 on 26th October 2015. By way of express recital, it is mentioned in the agreement of sale Exh. 20 that

possession of the property mentioned in the agreement, which is subject matter of the suit, will be handed-over after the sale deed is executed.

2. Considering the claim putforth by the respective parties, both the Courts below allowed the suit of the respondent/plaintiff for specific performance and possession, which is subject matter of challenge in the present appeal.

3. Learned Counsel for the appellant would raise following question of law.

In view of provision of Explanation 1 to Article 25 of Schedule 1 of the Bombay Stamp Act, whether the document Exh. 20 could be termed as conveyance deed, and as such, the complete stamp duty is leviable or not.

4. In the backdrop of the ground raised, the learned Counsel for the appellant would invite my attention to the provision of Explanation 1 to Article 25 of Schedule 1 to the Bombay Stamp Act, and relying upon Judgment of the Division Bench of this Court in the matter of **Naginbhai P. Desai Vs. Taraben A. Sheth (AIR 2003 Bombay 192)**, would urge that both the Courts below have committed error in recording finding that the document Exh. 20 is not conveyance within the meaning

of aforesaid provision. He would urge that the appeal, as such, needs consideration.

5. Per contra, learned Counsel Shri Shaha for the respondent, while trying to explain said provision, particularly Explanation 1 to Article 25 of Schedule I, would urge that if the conveyance i.e. Exh. 20 provides for handing-over of possession before the execution of sale deed, the appellant could have been rightly invoking the provision. According to him, in the case at hand, it was expressly agreed between the parties pursuant to agreement Exh. 20 that possession will be handed-over after the execution of the sale deed. He would rely upon recitals to that effect in Exh. 20. In addition, he would invite attention of this Court to the observation made by Single Judge in Order dated April 10, 2012 passed in Writ Petition No. 1841 of 2011, particularly, Paragraphs 4 and 6, which read thus:

“4. Shri Shah, the learned counsel for the respondent submits that reading explanation 1 to Article 25 of Sch.I of the Bombay Stamp Act it is manifest that even when the possession is delivered at the time of conveyance said document would attract the stamp duty. The learned counsel submits that words appearing in the explanation “without executing the conveyance in respect thereof “ are deleted. Meaning thereby, that even if at the time of conveyance i.e. the execution of sale deed the possession

is to be delivered, such an agreement of sale would require stamp duty as that of conveyance. According to the learned counsel Division Bench of this Court in the case of **Balawanigir Ganpatgir Giri (deceased through L.Rs) Vs. Manasi Construction and Developers and others reported in 2006 (6) ALL MR 109** has not considered this aspect.

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6. Perusal of the agreement of sale, it is manifest that said agreement of sale lays down that possession would be delivered at the time of execution of the sale deed. This aspect has been considered by the Division Bench of this Court in a case of **Balwantgir Ganpatgir Giri through his Lrs. Nanibai Wd/o Balwantgir Giri and others Vs. Manasi Construction and Developers reported referred supra**, wherein Division Bench held thus :-

“ 13. Taking into consideration all the facts and circumstances on record, it is therefore, clear, that the agreement dated 3.3.2000 is purely an agreement for sale wherein there is no recital for delivery of possession in terms of agreement. On the contrary, the terms of agreement are to the effect that the possession would be delivered on execution of the sale deed. Hence, such an agreement cannot be construed as a conveyance within the meaning of the said Act.”

6. In addition, drawing support from Paragraphs No. 9 and 10 from the Judgment of the Division Bench of this Court in the matter of

Balwantgir Ganpatgir Giri through his Lrs. Nanibai wd/o Balwant Giri and others {2006 (5) Mh.L.J. 306}, he would urge that the issue no more requires consideration and the provisions of the Article 25 Explanations thereof are not attracted in the facts of the present case. He sought dismissal of the appeal.

7. Considered rival submissions. Perused the agreement of sale Exh. 20 dated 26th October 2015.

8. It is not in dispute that recitals therein provide for handing-over possession of the suit property upon execution of the sale deed. If said recital is considered in the backdrop of the requirement under Explanation 1 to Article 25, what is to be inferred is, before execution of the sale deed the possession was not to be parted by the present appellant to the respondent. In the wake of said recitals, it is really difficult to accept contention of the appellant that the document Exh. 20 has to be termed as conveyance, as defined, for the reason of committal of handing-over of possession, may be at the time of or after execution of the sale deed. Learned Counsel Shri Shaha, in my opinion, has rightly drawn support from the Division Bench Judgment of this Court in the matter of **Balwantgir Ganpatgir Giri, and Raosaheb Khandu Patil**, (cited supra).

9. So far as claim of the appellant, to establish his above claim by relying upon the Division Bench Judgment of this Court in the matter of **Naginbhai P. Desai** (cited supra) is concerned, it is to be noted that the recital of the agreement to sell in the said matter as is reflected in Paragraph No.5, the possession was to be handed-over prior to the execution of the sale deed, and as such, the Division Bench has rightly inferred therein that the document was a conveyance within the meaning of Explanation 1 to Article 25 of the Bombay Stamp Act.

10. In the backdrop of above referred findings recorded by this Court and in view of the concurrent findings, I hardly notice involvement of any question of law, which calls for interference in the Second Appellate Jurisdiction. The appeal, in my opinion, fails and, as such stands dismissed.

(**NITIN W. SAMBRE, J.**)

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