

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

**SECOND APPEAL NO.470 OF 2012
WITH
CIVIL APPLICATION NO.10952 OF 2012
WITH
CIVIL APPLICATION NO.10951 OF 2012**

Junaaid Khan s/o. Hameed Khan,
Age : 35 years, Occ. Business,
r/o. Chavni, Cantonment,
Aurangabad ..Appellant

Vs.

1. Pandurang s/o. Balaji Puri,
Age : 42 years, Occ. Business,
r/o. Near Main Mandir,
Bhavsingpura,
Aurangabad
2. Dnyaneshwar s/o. Pandurang Puri,
Age : 38 years Occ. Govt Service,
r/o. Near Industrial Training
Centre Institute,
Opp. Indian Oil Corporation,
MIDC Road, Railway Station,
Aurangaabad ..Respondents

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Mrs.C.S.Deshmukh, Advocate for appellant

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CORAM : SANGITRAO S. PATIL, J.

DATE : JULY 24, 2017

ORAL ORDER :

The original plaintiff has preferred this appeal against the judgment and decree dated 25.08.2011 passed in R.C.A. No.213 of 2009 by the learned District Judge-1, Aurangabad, whereby the

judgment and decree dated 31.12.2008 passed in Special Civil Suit No.445 of 2007 by the learned 4th Joint Civil Judge, Senior Division, Aurangabad, has been confirmed, to the extent of dismissal of the suit for specific performance of agreement of sale.

2. The appellant had filed the suit for specific performance of an agreement of sale dated 07.07.2004 Exh.27 for purchase of 20 Gunthas land bearing block No.19/1 and further agreement dated 05.11.2004 for purchase of another 20 Gunthas land out of the same land. The price of the said lands was fixed as Rs.1,05,000/- and Rs.1,10,000/- respectively. The appellant paid an amount of Rs.1,70,000/- out of the total price of land. He was ready and willing to pay the balance amount of Rs.45,000/-, however, the respondents did not execute sale-deeds in respect of the above-mentioned lands and therefore, the suit came to be filed for specific performance of the said agreements.

3. The respondent resisted the suit on various factual grounds. After considering the evidence on record, the trial Court held that respondent no.2 executed the agreement of sale on 07.07.2004 in favour of the appellant and received an amount of Rs.50,000/- as earnest money out of price of the land of Rs.1,05,000/-, but failed to pay the balance amount of Rs.55,000/-. It was, therefore, held that the appellant was not ready and willing to perform his part of contract. Therefore, the relief of specific performance came to be rejected and instead, the decree for refund of earnest money of Rs.50,000/- came to be passed. It was further held that no agreement of sale in respect of another 20 Gunthas of land was proved and therefore, the amount of Rs.1,20,000/- [Rs.1,10,000/- vide receipt (Exh.41) and Rs.10,000/- vide receipt (Exh.30)] was ordered to be repaid to the appellant.

4. The learned Counsel for the appellant submits that the document Exh.41 ought to have

been considered as an agreement of sale by the trial Court as well as the first appellate Court. The amount of Rs.1,10,000/- paid as per the document Exh.41 and also the amount of Rs.10,000/- paid vide receipt Exh.30 to the respondents is not in dispute. The amount of Rs.45,000/- only had remained to be paid to the defendants. The appellant issued notice on 08.08.2007, offered the amount of Rs.45,000/- and called the respondents to perform their part of the contract. However, the respondents failed to comply with that notice. Therefore, according to the learned Counsel for the appellant, the findings recorded by the trial Court as well as the first appellate Court that the appellant was not ready and willing to perform his part of contract, cannot be said to be correct and proper. She submits that the Second Appeal may be admitted.

5. The respondents were served, but remained absent.

6. Perused the document Exh.41. It simply

contains the fact of payment of Rs.1,10,000/- by the appellant to respondent no.1. The recitals therein, by no stretch of imagination, can be called as that of an agreement of sale. The trial Court as well as the first appellate Court did not consider that document as an agreement of sale. I do not find any fault in this concurrent finding of fact recorded by the trial Court as well as the first appellate Court. The trial Court as well as the first appellate Court have ordered to repay the amount of Rs.1,10,000/-, subject matter of the document (Exh.41) dated 05.11.2004 to the appellant treating it as money transaction.

7. So far as the suit land subject matter of agreement dated 07.07.2004 Exh.27 is concerned, the price thereof was fixed at Rs.1,05,000/-. The amount of Rs.50,000/- was paid by the appellant to respondent no.1. The contents of the agreement Exh.27 dated 07.07.2004, show that the balance amount of Rs.55,000/- was to be paid within a period of two months at the time of execution of

the sale deed. The sale deed was to be executed on demanded by the appellant. Even if the sale deed was to be executed on demand, the first recital that the balance amount of Rs.55,000/- was to be paid within two months from the date of execution of the agreement at the time of execution of the sale deed, would restrict the period for execution of the agreement of sale to two months. In any case, the balance amount of Rs.55,000/- was to be paid within two months from the date of execution of the agreement. The amount of Rs.10,000/- seems to have been paid vide receipt (Exh.30) on 15.07.2004. There is nothing on record to show that the appellant ever tried to pay the remaining amount of Rs.45,000/- to respondent no.1 within that period of two months.

8. The appellant seems to have issued notice Exh.28 on 08.08.2007 and offered the balance amount of Rs.45,000/- to respondent no.1. This offer *ex-facie* is belated one. In the circumstances, the findings of the trial Court as

well as the first appellate Court that the appellant was not ready and willing to perform his part of contract, since he failed to pay the balance amount within the time limit prescribed in the agreement, can be said to be well-founded. The suit for specific performance of agreement has been rightly discussed and direction for refund of money received from the appellant has been rightly given by passing decree to that effect.

9. In the above circumstances, I do not find any reason to interfere with the concurrent findings of facts recorded by the trial Court as well as the first appellate Court. No substantial question of law is involved in this appeal.

10. The Second Appeal is dismissed. Civil Applications are disposed of.

[SANGITRAO S. PATIL, J.]