

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

WRIT PETITION NO. 14279 OF 2017

Smt. Mirabai W/o Namdeo Borde
and others

...PETITIONERS

VERSUS

Miss Donika D/o Kirtikumar Ruparel
and Anr.

...RESPONDENTS

.....

Advocate for Petitioners : Mr. G.D. Jain (Bhansali)

CORAM : V.K.JADHAV, J.
DATED : 11th DECEMBER, 2017.

PER COURT :-

1. Being aggrieved by the order dated 29.6.2017 passed below Exhibit 22 in Regular Civil Appeal No.71 of 2010, the petitioners (original defendants 1, 2 and 4-respondents before the lower appellate court) approached this court by filing present writ petition.

2. The respondent No.1/original plaintiff has instituted the suit for specific performance of contract and said suit came to be dismissed. Being aggrieved by the same,

respondent No.1/plaintiff has preferred Regular Civil Appeal No.71 of 2010. In the said pending appeal, respondent No.1 has filed application Exhibit 22 stating therein that inadvertently, she failed to pray for alternate relief of refund of money in case decree of specific performance cannot be granted in her favour. The present petitioners strongly resisted the said application by filing their say. Learned Additional District Judge-8, Aurangabad by its impugned order dated 29.06.2017 allowed the said application. Hence, this writ petition.

3. The learned counsel for the petitioners submits that the trial court has framed additional issue Nos. 6 and 7 and also recorded findings in the affirmative and thereby held that petitioner Nos. 1 and 2 herein obtained loan of Rs.1,50,000/- from respondent No.1/plaintiff and they repaid the said amount and there is no balance against them. The learned counsel submits that the lower appellate court allowed said application Exh.22, however, in para No.6 of order, the court has observed that even though petitioner Nos. 1 and 2 herein have repaid the loan amount, as held by the trial court, then also the question arises

whether the amount so paid as consideration of the transaction or as a loan depends upon the facts.

4. In case of suit for specific performance, Section 22 (2) of Specific Relief Act specifically provides that if the relief for possession/specific performance is not allowed, the relief for refund of earnest money or consideration can be allowed. Such relief can be incorporated by seeking amendment at any time even in the pending appeal. So far as the observations made by the lower Appellate Court in para No.6 of the impugned order, it is for the lower appellate Court to consider the same in the light of amendment permitted by the court by allowing application Exh.22 for remand of the matter by granting opportunity to the parties to substantiate their respective case about refund of the earnest amount.

5. In view of above, I do not find any reason to interfere in the impugned order. Writ petition is hereby dismissed. No costs.

(V.K.JADHAV, J.)

mta/-