**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (ST.) NO.9912 OF 2016**
**WITH**
**CIVIL APPLICATION NO.727 OF 2016**

Shri Mohammad Salim Shaikh And Another … Appellants
Versus
Shri Raju Abrahim And Others … Respondents

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Mr. Nitin P. Dalvi i/b A.A. Siddiqui for the Appellants.
Mr. Uday P. Warunjikar for Respondent Nos.1 And 2.

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**CORAM : S.C. GUPTE, J.**

**DATE : 9 FEBRUARY 2017**

**P.C. :**

. Heard learned Counsel for the parties.

2 This second appeal challenges a judgment and order passed by the District Court at Vasai. By this judgment and order, the learned District Judge dismissed the appeal filed by the Appellants herein from the judgment and decree passed by the Civil Judge, Senior Division, Vasai in favour of Respondent No.1 in Special Civil Suit No.122 of 2008.

3 The suit was filed by Respondent Nos.1 and 2 (original Plaintiffs) for specific performance of an agreement for sale executed in their favour of Respondent No.3 herein (original Defendant No.1). The Plaintiffs' case was that Defendant No.1 agreed to sell the suit property, which consists of a flat admeasuring 598.5 sq.ft. in a building known as 'Akash Tower' situated in

Survey Nos.102 and 103 at Village Nelemore, Tal. Vasai, Dist. Thane ("suit flat"), under an agreement for sale executed between the parties on 1 October 2007. The suit agreement for sale is registered with the Sub-Registrar of Assurances. The Plaintiffs claimed to have paid a sum of Rs.1,00,000/- at the time of the registration of agreement for sale. The balance consideration of Rs.7,00,000/- was to be paid within 60 days from the date of the suit agreement. The Plaintiffs also claimed to have paid a further sum of Rs.2,00,000/-, as also incurred expenses of stamp duty, registration and commission to the estate agent, amounting to Rs.70,000/-. It is the case of the Plaintiffs that Defendant No.1 was to clear her title and hand over the original documents of the suit flat to the Plaintiffs at the time of payment of the balance amount and completion of sale. The Plaintiffs claimed that Defendant No.1 had taken a loan from ICICI Bank by mortgaging the suit flat. The Plaintiffs requested Defendant No.1 to clear the outstanding loan and hand over the original documents of title as also the possession of the suit flat against payment of the balance consideration of Rs.5,00,000/-. It is the case of the Plaintiffs that Defendant No.1 failed to do so and as a result, the Plaintiffs were constrained to file the present suit claiming specific performance of the suit agreement for sale. Defendant No.1 never contested this suit. It, however, appears that during the pendency of the suit, by an agreement for sale executed on 9 November 2009, Defendant No.1 agreed to sell the suit flat to the Appellants (original Defendant Nos.2 and 3). It is submitted that on the same date, i.e. on 9 November 2009, Defendant nos.2 and 3 paid a sum of Rs.14,00,000/- as consideration for the purchase of the suit flat by way of cheque and cash to Defendant No.1. Defendant Nos.2 and 3 claimed to be in possession of the suit flat in pursuance of this agreement for sale. They claimed to have no knowledge about the earlier agreement for sale between the Plaintiffs and Defendant No.1.

4 On these pleadings, the Trial Court framed issues concerning the existence and validity of the suit agreement for sale and also the Plaintiffs' readiness and willingness to perform the same, as also the effect of the agreement for sale of 9 November 2009 set up by Defendant Nos.2 and 3. All these issues were found by the Trial Court in favour of the Plaintiffs. The First Appellate Court rendered concurrent findings in respect of the existence and validity of the suit agreement for sale and the Plaintiffs' readiness and willingness to perform the same. The First Appellate Court also held that the agreement of 9 November 2009 set out by Defendant Nos.2 and 3 was entered into during the pendency of the suit and not binding on the Plaintiffs on the principle of *lis pendence*. The First Appellate Court, accordingly, dismissed the appeal.

5 Learned Counsel for the Appellants submits that the finding of readiness and willingness rendered by the Courts below in favour of the Plaintiffs, is vitiated by an error of law. It is submitted that the suit agreement for sale had a specific stipulation for payment of the balance consideration of Rs.7,00,000/-. The agreement provided for a period of 60 days within which this amount had to be paid. Besides, it is submitted that the Plaintiffs' case of having paid the cash amount of Rs.2,00,000/- to the Defendant, as also Rs.70,000/- towards expenses of stamp duty, registration and commission of estate agent, found by the Courts below, is without any evidence. The Appellants, being the subsequent purchasers of the suit flat during the pendency of the Plaintiffs' suit for specific

performance, can hardly assert this plea. It was for Defendant No.1 to allege and prove that either she did not receive the sum of Rs.2,00,000/- or that further expenses as alleged by the Plaintiffs were not incurred or that according to the bargain between the parties, time was of essence. The Courts below have concurrently found that Defendant No.1 (original Vendor) was not in a position to hand over the documents of title in respect of the suit flat, though the Plaintiffs and that the Plaintiffs were ready and willing to perform their part of the contract. No substantial question of law can be said to arise from these concurrent findings in the face of Defendant No.1 not having contested the Plaintiffs' suit.

6 Learned Counsel for the Appellants further submits that the Defendants are bonafide purchasers for value without notice. No plea of 'bonafide purchaser for value without notice' is available to a subsequent transferee, whose transfer is effected during the pendency of any suit in which any right to immovable property is directly in question. Under Section 52 of the Transfer of Property Act, 1882, in the face of a pending suit for specific performance of an agreement for sale of the subject immovable property, there is no question of the property being transferred or otherwise dealt with by any party to the suit so as to affect the rights of the other party thereto under any decree or order which may be made therein except when such property is dealt with under the authority of the Court and on such terms as it may impose. The only exception to this is when the proceedings between the parties are collusive. That is not the case here. No plea of bonafide purchaser for value without notice can, in the premises, be entertained in the present case.

7 In any case, it is important to note that the agreement for sale dated 9 November 2009 set up by the Appellants was entered into without even a modicum of an inquiry as to the title or capacity of the plaintiffs to enter into the agreement. It was entered into without even issuing any public notice. No title search was admittedly conducted by the Appellants herein. These are important pointers to the fact that the agreement was not entered into bonafide.

8 Learned Counsel for the Appellants lastly submits that the Court has discretion in the matter of grant of specific performance and ought to have balanced the equities between the parties, namely, the original Plaintiffs on the one hand and Defendant Nos.2 and 3 (Appellants) on the other. The Appellants are mere subsequent agreement purchasers, who claim to have purchased the suit property during the pendency of a suit for specific performance between their Vendor and an earlier agreement purchaser. They cannot set up any equitable claim against the earlier purchaser Plaintiff.

9 Accordingly, there is no merit in the second appeal. The same is dismissed. No order as to costs.

10 In view of the dismissal of the second appeal, the civil application does not survive and the same is also disposed of.

**(S.C. GUPTE, J.)**