

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

**SECOND APPEAL NO. 930 OF 2015
ALONGWITH
CIVIL APPLICATION NO. 2062 OF 2015**

Shri Jaysingh Tukaram Pawar,
deceased through his legal heirs,
Shri Ajay Jaysingh Pawar & Anr.

...Appellants

vs.

Sou.Sushma Sanjay Gaikwad

...Respondent

Mr.Nikhilesh Pote for Appellants.
Mr.P.B. Shah I/b. K.P. Shah for Respondent.

**CORAM : S.C. GUPTE, J.
20 FEBRUARY 2017**

P.C.:

Heard Learned Counsel for the parties.

2 The present second appeal challenges a judgment and order passed by the District Court at Satara in Regular Civil Appeal No.250/2012. By the impugned judgment and order, the learned District Judge allowed the appeal filed by the Respondent herein and decreed her suit for specific performance.

3 It was the case of the Respondent (original Plaintiff) that in the year 2005, the predecessor of the present Appellants (original Defendant) started construction of shops in the property, bearing Survey Nos.561 and 562, at Panchwad, Wai, and put them up for sale. The Defendant agreed to sell Shop Nos.1 and 2 to the Plaintiff and accepted a sum of Rs.2.99 lakhs as earnest money. There is a registered agreement for sale in favour of the Plaintiff for these two shops for a total consideration of

Rs.3 lakhs. The Defendant was to complete construction of the shops within 26 months and handover possession thereof to the Plaintiff, whereupon the balance consideration of Rs.1000/- was to be paid and the sale deed was to be executed. It was further the Plaintiff's case that on the same date, another agreement for sale was registered putting the total consideration at Rs.6.50 lakhs, out of which a sum of Rs.3 lakhs was to be paid in accordance with the registered agreement and the balance amount of Rs.3,50,000/- to be paid in instalments. It was the Plaintiff's case that in accordance with this latter document, she paid sums of Rs.35,000/-, Rs.15,000/-, Rs.50,000/- and Rs.25,000/-, respectively, on 25 March 2005, 12 May 2005, 12 November 2005 and 28 January 2007, thus, amounting to an aggregate payment of Rs.4,25,000/- towards purchase of the suit shops. It was her case that she had been ready and willing to pay the balance amount of Rs.2.25 lakhs. It was also her case that by another agreement executed on 23 May 2007, the time to complete the suit transaction was extended until 8 September 2007.

4 The trial court found all these facts in favour of the Plaintiff. The trial court, however, found that the Defendant had proved that he was to construct on City Survey Nos.558 and 564 and that the Plaintiff had paid the initial amount of Rs.3 lakhs to the Defendant for purchase of these two survey numbers. It was further held by the court that the Defendant had proved that he had agreed to sell two shops from out of the construction on City Survey Nos.558 and 564, but that he had executed a sale agreement in respect of shops in City Survey Nos.561 and 562 as a security for the money paid by the Plaintiff and that since the Plaintiff did not finally evince interest in buying shops in City Survey No.558 or 564, the Defendant agreed to refund the amount of Rs.4,25,000/- paid by the

Plaintiff. The trial court also found that the suit was premature in that the extension of the period for the completion of sale under the agreement dated 23 May 2007 was upto 8 September 2007 whereas the suit was filed on 16 August 2007.

5 The matter was brought in appeal before the District Court by the Plaintiff. In its impugned judgment and order, the learned District Judge held that the Plaintiff had sufficiently established that the Defendant had agreed to sell the suit shops to her at a consideration of Rs.6,50,000/-, out of which she had paid a sum of Rs.4,25,000/- and that she was ready and willing to perform her part of the contract by paying the balance amount of Rs.2,25,000/-. The learned Judge found that the Plaintiff had, in fact, issued a notice calling upon the Defendant to execute a sale deed in her favour and also attended the Sub-Registrar's office on 9 August 2007 for execution of the same. The Court did not find any circumstance making the enforcement of specific performance of contract, inequitable. The District Court, accordingly, granted a decree of specific performance against the Defendant. In particular, as regards the defendant's argument that the suit agreement for sale was, in fact, a loan transaction or was in respect of two shops in CTS No.558 or 564, the court found that the onus to prove these facts, which are contrary to the written document executed between the parties, was on the Defendant and that no oral or documentary evidence was led by the Defendant to discharge his onus. The District Court, accordingly, allowed the Plaintiff's appeal and set aside the judgment and decree passed by the trial court and decreed the suit by directing specific performance of the agreement for sale.

6 Both courts below have found the execution of the agreement

for sale on 23 March 2005 as duly proved. The agreement for sale pertains to two shops in the property bearing CTS No.561 and 562. Both courts have found that the Plaintiff had paid a total sum of Rs.4,25,000/- to the Defendant from out of the total consideration fixed under the agreement of 23 March 2005. Both courts have also found that the Plaintiff was ready and willing to perform her part of the contract under the contract. The courts, however, differed on the nature of the document of 23 May 2005. The trial court found the document to be executed by way of a security for monies paid by the Plaintiff to the Defendant for purchase of certain plots of land, whereas the first appellate court found the document of 23 March 2005 to be an agreement for sale in respect of two shops in the property bearing Nos.561 and 562. The first appellate court correctly observed that the onus to show that the document of 23 March 2005, which purportedly contained an agreement for sale in respect of two shops on the property bearing CST Nos.561 and 562, was really meant to be a security for payment made by the Plaintiff to the Defendant for some other purpose, was on the Defendant. The first appellate court came to the conclusion that the Defendant had not led any cogent documentary or oral evidence to discharge this onus. This essentially is a finding based on evidence on the part of the first appellate court. If one has regard to the documentary and oral evidence on record, it cannot be said that the conclusion drawn by the first appellate court on this issue is vitiated by any error of law, much less any substantial error of law. The conclusion drawn by the first appellate court is based on evidence. No relevant or germane material on record is disregarded and no non-relevant or non-germane material is taken into account to reach the conclusion. It is a possible conclusion based on evidence.

7 The present second appeal, in the premises, does not give rise to any substantial question of law. The second appeal is, accordingly, dismissed. No order as to costs.

8 Learned Counsel for the Appellant prays for continuation of the ad-interim stay granted by the lower appellate court and extended by this court during the pendency of the second appeal. On his application, the ad-interim stay of the impugned order operating till date, is extended by a further period of six weeks from today.

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

(S.C. GUPTE, J.)