

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

SECOND APPEAL NO.168 OF 2017

Milind Mohan Vadanagekar
 v/s.
 Tukaram Vithoba Shinde (Sutar)
 and another

... Appellant
 ... Respondents

Mr.Dormaan J. Dalal for the Appellant.
 Mr.Hitesh Vyas for the Respondents.

...
CORAM : A.A. SAYED J.
DATED : 14 NOVEMBER 2017

ORAL ORDER:

The Appellant/original Plaintiff has filed this Second Appeal under section 100 of the Code of Civil Procedure, 1908 challenging the judgment and order dated 05-02-2016 of the District Judge dismissing the Appeal of the Appellant/original Plaintiff, thereby confirming the judgment and order dated 27-07-2012 of the Trial Court, whereby the suit of the Appellant/original Plaintiff was decreed. While declining the prayer for a specific performance of the Agreement for Sale dated 23-01-2001, the Trial Court considered the alternative prayer and directed the Respondents/original Defendants to pay Rs.1,40,000/- to the Appellant/original Plaintiff jointly and severally alongwith interest at the rate of 12% p.a. on the amount of Rs.1,40,000/- from 23-01-2001 till realization. The parties shall hereinafter be referred to as per their status in the suit.

2. It was the case of the Plaintiff in the suit for specific performance of the Agreement for Sale dated 23-01-2001 that he purchased the suit property as investment and the total consideration of Rs.1,40,000/- was paid to the Defendants by issuing two cheques of Rs.1,00,000/- and Rs.40,000/- respectively. The said Agreement was registered. The Defendants accordingly have received the entire amount of consideration and handed over the possession of the suit property to him by executing a Tabe Pavati on 25-01-2001 (i.e. after two days of execution of the Agreement). According to the Plaintiff, the Sale Deed was to be executed within 14 months from the date of the Agreement for Sale. The Plaintiff had issued a notice dated 4-05-2001 through his Advocate. However, the Defendants refused to accept the same. Therefore, he was constrained to file the suit as the Defendants failed to execute the Sale Deed. In the alternative, it was prayed that the amount of consideration alongwith interest @ 24% and damages be paid to the Plaintiff.

3. The case of the Defendant No.1, on the other hand, in the Written Statement before the Trial Court was that the Plaintiff used to lend money on interest. Since he was in need of money and undergoing financial crisis, he approached the Plaintiff and he was granted a handloan of Rs.1,40,000/-

by the Plaintiff. The Agreement for Sale was executed as and by way of security. The suit property was in his possession and was never given to the Plaintiff and there was no intention to sell the suit property. The suit property was ancestral property and there were other family members who had shares therein and there was no partition effected. It was agreed that after repayment of the money by the Defendants to the Plaintiff, the Agreement would be cancelled.

4. The Trial Court in the judgment noted that the Defendant No.2 did not come forward to adduce evidence and also did not remain present at the time of argument and the suit proceeded ex parte against him. The Trial Court noted that the Defendant No.1 failed to cross-examine the Plaintiff in spite of sufficient opportunity given to him. The Trial Court concluded that the Defendants had denied handing over possession of the suit property to the Plaintiff and the Plaintiff failed to prove that the possession of the suit property was handed over to him and that the Tabe Pavati was not sufficient to prove possession. The Trial Court noted that the Tabe Pavati was inadmissible in evidence as the same was not registered and no stamp duty was paid on the said document. No independent oral or documentary evidence was produced to prove his possession by the Plaintiff. The Trial Court noted that despite the entire consideration amount being paid, the

Plaintiff did not insist for execution of the Sale Deed and that no prudent man would have failed to execute the Sale Deed when the entire consideration amount was paid and there was nothing on record brought by the Plaintiff to show what prevented him from insisting on execution of the Sale Deed on 23-01-2001 itself. The Trial Court further held that it is not established by the Plaintiff that the possession of the suit property was handed over to the Plaintiff on 25-01-2001 as claimed by him. The Trial Court noted that the Sale Deed was agreed to be executed within 14 months from 23-01-2001. The Trial Court observed that no doubt as per the Limitation Act the period of three years is provided for seeking specific relief, however, the conduct of the parties are required to be seen and there was nothing placed on record to show why the suit was filed after more than 2½ years. No evidence was produced to show that the notice dated 04-05-2001 was served and the Defendants refused to accept the service and it cannot be said that efforts were made by the Plaintiff for getting the Sale Deed executed. The service of notice dated 4-05-2001 was not proved. The Trial Court noted that the Defendant No.1 was an agriculturist, whereas the Plaintiff was a businessman and wanted the suit property for investment purpose only and concluded that it cannot be said that in absence of decree of specific performance, the Plaintiff would suffer hardship and that if the relief of specific performance is granted, the Plaintiff would get unfair

advantage over the Defendants. The Trial Court noted that though the cheque of Rs.40,000/- was issued on the same day as the Agreement, the Agreement does not refer to the said payment. In these circumstances, the Trial Court held that the Plaintiff was not entitled to the decree of specific performance and directed the above consideration amount of Rs.1,40,000/- to be refunded alongwith interest at the rate of 12% p.a.

5. The District Judge (lower Appellate Court) while confirming the judgment of the Trial Court after reappreciating the evidence on record considered the conduct of the parties and found that the Sale Deed was to be executed in favour of the Plaintiff within 14 months from the date of Agreement for Sale and the Plaintiff did not initiate action until the suit was filed after 2½ years. The lower Appellate Court held that the Plaintiff did not make any request at any point of time to the Defendants to perform their part of the contract and there is no explanation from the Plaintiff why he did not take steps to show his willingness to perform his part of contract. The Appellate Court held that the Plaintiff was guilty of delay and laches, which amounts to waiver or acquiescence and having regard to the conduct of the Plaintiff, the Trial Court rightly rejected the discretionary relief of specific performance of contract and accordingly dismissed the Appeal.

6. Learned Counsel for the Appellant has placed reliance on the following judgments:

- (i) **Mademsetty Satyanarayana v/s. G.Yelloji Rao and ors**, AIR 1965 SC 1405;
- (ii) **Jitendra Nath Roy v/s. Smt.Maheshwari Bose**, AIR 1965 Calcutta 45;
- (iii) **Purnimakumari Dharmendra Jain and anr. v/s. J.Gala Builders and ors.** 2013 (6) Mh.L.J. 838;
- (iv) **Indrabai Dattatraya Vaidya and ors. v/s. Vijaya Dattatraya Vaidya and anr.** 1984 Mh.L.J. 1053;

7. Learned Counsel for the Defendants has placed reliance on the following judgments:

- (i) **Krishna Mohan Kul alias Nani Charan Kul and anr. v/s. Pratima Maity and anr.**, (2004) 9 SCC 468;
- (ii) **Parminder Singh v/s. Gurpreet Singh**, AIR 2017 SC 3601;
- (iii) **Lakshmi & ors. v/s. Muthusamy**, 2012 1 CTC 53;
- (iv) **N.P.Thirugnanam v/s. Dr.J.Jagan Mohan Rao and ors.** (1995) 5 SCC 115;

8. I have heard the learned Counsel for the parties. I have perused the judgments of the Trial Court and the Appellate Court. Both the Courts have exercised their discretion denying the relief of specific performance to the Plaintiff and instead considered the alternative prayer and granted refund of the amount of Rs.1,40,000/- paid by the Plaintiff to the Defendants

alongwith interest at the rate of 12% p.a. The Court is informed that this amount alongwith accrued interest has already been deposited in the Trial Court by the Defendants. In my view, the discretion exercised by the Courts below cannot be said to arbitrary or unreasonable or not in accordance with the judicial principles laid down under Section 20 of the Specific Relief Act, 1963. The Agreement does not reflect the payment of Rs.40,000/-, which was paid on the same date as execution of the Agreement. Possession was not taken on the same day as the execution of the Agreement, though the entire amount of Rs.1,40,000/- was paid on the same day and the possession was allegedly taken two days later. The Plaintiff has alleged in the Plaint that he came to know that the Defendants were trying to create 3rd party rights and therefore had sent Notice through his Advocate, which was refused. The Plaintiff however has neither filed proceedings seeking any restraint order against the Defendants at the relevant time, nor sent the alleged notice through any other mode like RPAD when it was allegedly refused to be accepted. The Courts below have considered the conduct of the parties and particularly of the Plaintiff and the attending circumstances in denying the relief of specific performance of the Agreement and instead granting refund of the amount alongwith interest @ 12% p.a. Merely because the Defendants had not appeared and failed to examine themselves would not mean that the Plaintiff would be entitled to the relief

of specific performance of the Agreement for Sale as a matter of course. The Plaintiff has admitted in his pleadings that the suit property was purchased by him as investment. The Trial Court has rightly observed that no prudent person would not execute the Sale Deed when the entire consideration amount was paid at the time of execution of the Agreement for Sale. In the Written Statement, the Defendant No.1 asserted that he is in actual possession of the suit property. The Trial Court has concluded that the possession receipt which was stated to have been executed 2 days after the Agreement for Sale, was not sufficient to establish possession of the Plaintiff. It is not possible to accept the contention of the learned Counsel for the Appellant that the Courts below have denied the specific performance only because of the delay. In the facts of the present case, the judgments relied upon by learned Counsel for the Appellant do not in any manner assist the Appellant. In my view, there is no substantial question of law involved in the present Second Appeal and no case is made out to interfere with the concurrent findings of the Courts below.

9. In the result, the Second Appeal is dismissed. There shall be no order as to costs.

(A.A.SAYED, J.)