

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

**SECOND APPEAL NO. 665 OF 2016
WITH
CIVIL APPLICATION NO.1316 OF 2016
IN
SECOND APPEAL NO. 665 OF 2016**

Smt. Chandrabhaga Ananda Kudle & anr. ... Appellants/Applicants
V/s.

Proposed Sanjay Sahakari Grah Nirman
Sanstha Maryadit, Sangli ... Respondents

...
Mr. Akshay P. Shinde for the appellants.
Mr. P. G. Kathane for respondent no.1.

...

CORAM : S. C. GUPTE, J.

DATE : 3 FEBRUARY, 2017.

P.C. :

. Heard the learned Counsel for the parties.

2. This Second Appeal challenges the Judgment and order passed by the learned District Judge of Sangli in Regular Civil Appeal No.255 of 2014. By that Judgment and order, the learned District Judge allowed the respondent's appeal and set aside the Judgment and decree passed by the Joint Civil Judge, Junior Division, Sangli in Regular Civil Suit No.71 of 2001 filed by respondent no.1.

3. Respondent no.1 is a chief promoter of a proposed cooperative housing society. He entered into an agreement for purchase of the

suit property with one Piraji Kudle, who is a predecessor in title of the present appellants. By this agreement Piraji agreed to sell the suit property to respondent no.1 for the use of the society for a sum of Rs.15,000/-. The terms and conditions of the sale are reflected in the agreement for sale dated 12 August 1981. In spite of respondent no.1 being ready and willing to perform his part of the contract by payment of the balance purchase consideration to Piraji's legal heirs, who are the present appellants before the Court, the latter refused to complete the sale. Respondent no.1, in the premises, filed the present suit against the appellants (original defendants) for specific performance of the agreement for sale dated 12 August 1981.

4. The suit was dismissed by the trial Court. The trial Court found the agreement for sale to be valid, subsisting and binding. It also found respondent no.1 to be ready and willing to perform his part of the contract. It, however, dismissed the respondent's suit on the ground that the proposed society was not a legal entity and as such had no locus to file the suit. The trial Court also held against respondent no.1 on the ground that the suit was barred by the principle of res judicata, since an earlier suit between the same parties, namely, Regular Civil Suit No.594 of 1987, was dismissed as withdrawn by respondent no.1.

5. The order was carried in appeal before the District Court by respondent no.1. The appeal involved only the question of locus of the plaintiff to file the suit and the bar on account of res judicata

The other findings of the trial Court, viz. concerning the execution, subsistence and validity of the suit agreement and the plaintiff's readiness and willingness to perform his part of the contract, did not form part of the appeal, since there were no cross objections filed by the appellants herein in that behalf. The District Court came to the conclusion that the agreement of sale was entered into by the plaintiff, Nazir Farid Shaikh, in his individual capacity though for the benefit of the proposed Society as its promoter. Though the Society was not registered and therefore, not a legal entity, the right of the promoter as an individual to enforce specific performance of the contract entered into for its benefit could not be denied. In the premises, the District Court reversed the findings of the trial court on the capacity of the plaintiff to file the present suit.

6. The appreciation of law on this point by the District Court is unexceptionable. In case a society is proposed to be formed, it is always the promoter of the society who enters into a pre-incorporation contract. The contract may be for the benefit of the society but the contracting party is the individual promoter. If this contract is breached despite the readiness and willingness on the part of the promoter, the promoter is entitled to seek specific performance of the suit in his individual capacity as a promoter of the society. Merely because in the cause tile of the suit, the name of the proposed society is shown as someone of whose behalf the promoter has filed the present suit, it cannot be said that the suit is filed by an unincorporated association of persons.

7. Learned counsel for the appellants relied on a judgment of this Court in the case of ***Mathura Bhuvan Co-op. Hsg. Scty. Ltd. Vs. The Official Liquidator and another***¹. In that case, the application was filed by the Society itself, the applicant being styled as “Mathura Bhuvan Co-operative Housing Society Ltd. (proposed)”. This Court held that the applicant was an unincorporated association of persons not yet registered as a cooperative society and as such was no person in the eyes of law having a right to sue. This judgment has no application to the facts of the present case, where the suit is filed by the promoter in his individual capacity.

8. Learned counsel for the appellants also relied on a judgment of this Court in the case of ***Gorakh Hilal Patil and another Vs. Parit Samaj Seva Mandal, Shirpur***². In this case, the suit was filed by a society, Parit Samaj Seva Mandal, Shirpur, for recovery of arrears of rent and for possession of premises. At the time of filing of the suit the Society was merely a proposed society and thus an unincorporated association of persons. It filed the suit through its president and four panchas when there were 262 members of the Mandal. The suit, being a suit filed in a representative capacity without following the procedure laid down under Order 1 Rule 8 of Civil Procedure Code, 1908 or by passing a resolution of all members authorizing the president and four panchas to institute such suit, was held to be incompetent. This judgment also has no application to the

1 [Company Application (L) No.452 of 2003, in Company Petition No.145 of 1983]

2 2012(2) Mh.L.J.

facts of the present case. In the present suit, it is not the proposed Society or unincorporated association of person who is the plaintiff before the court but an individual promoter.

9. As far as the issue of res judicata is concerned, the First Appellate Court has rightly held that the earlier suit was filed by the present plaintiff against the present defendants for perpetual injunction only. That suit was eventually sought to be withdrawn with liberty to file a fresh suit after the incorporation of the society. The suit was, accordingly, dismissed as withdrawn. This withdrawal of the suit, in the first place, does not amount to a matter “heard and finally decided” by the court. In any event, withdrawal of a suit for injunction simplicitor by the plaintiff cannot operate as res judicata for a separate suit for specific performance of the contract. There is no error of law in the findings of the First Appellate Court

10. In the premises, the impugned judgment and order of the First Appellate court does not give rise to any substantial question of law. The Second Appeal is, accordingly, dismissed. No order as to costs.

11. In view of the disposal of the Second Appeal, the civil application does not survive and accordingly, stands disposed of.

12. The order of stay of execution of the impugned judgment and order passed by this court on 30 August, 2016 to continue to operate for a period of three weeks from today on a condition that the

appellants shall not carry out any construction on the suit property or create any third party right therein or part with possession thereof.

(S. C. GUPTE, J.)