IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION
SECOND APPEAL NO. 916 OF 2016
WITH
CIVIL APPLICATION NO. 1884 OF 2016

Sau. Bebutai Appaso Gaikwad … Appellant

Versus

Shri. Sripati Balwant Kadam … Respondent

Mr. S.V. Sadavarte for the Appellant and Applicant.
Mr. Manoj Patil for the Respondent.

CORAM : S.J. KATHAWALLA, J.
DATED : 22nd JUNE, 2017

P.C.:

1. The Regular Civil Suit No.247 of 2010 was filed by the original Plaintiff Shri. Sripati Balwant Kadam (Respondent herein) before the Learned Civil Judge Senior Division, Kolhapur (Trial Court), wherein the Plaintiff had prayed for specific performance of the Agreement for Sale dated 13th April, 2009. By the Judgment and Decree dated 21st June, 2013, the Trial Court allowed the suit and directed the Defendant (Appellant herein) to specifically perform the Agreement dated 13th April, 2009 and to handover possession of the suit property to the original Plaintiff. Being aggrieved, the Appellant/original Defendant impugned the Judgment and Decree of the Trial Court dated 21st June, 2013 by filing the Regular Civil Appeal No.218 of 2015

before the Court of District Judge-2, Kolhapur (Appellate Court) which too was dismissed with costs by a detailed Judgment and Decree dated 18th July, 2016. The Appellant/original Defendant once again being aggrieved therefrom have preferred the above Second Appeal under Section 100 of the Code of Civil Procedure, 1908.

2. For the sake of convenience, the Appellant and the Respondent are referred to hereinafter as per their original status, i.e. as Plaintiff and Defendant respectively.

3. The Defendant is the married daughter of the Plaintiff. In the year 2002 for the purpose of purchasing Plot No.3 bearing Survey No./Property No.1557, Datta Colony, admeasuring 175 sq.meter, the Defendant took a loan of Rs.50,000/- from her father. Thereafter, in the year 2003, the Defendant again took a loan of Rs.3,00,000/- from her father to enable her to construct a house on the said plot. The said plot and the construction carried out thereon shall be hereinafter referred to as 'the suit property'. Since the Defendant avoided to return the loan of Rs.3,00,000/- to the Plaintiff and since the value of the property was Rs.7,00,000/-, the Plaintiff suggested to the Defendant that she may transfer 50% share of the property in the name of Plaintiff. After negotiations, the Defendant agreed to sell the suit property to the Plaintiff for Rs.9,50,000/- and an Agreement for Sale was executed. In the said Agreement for Sale, it was decided that the Defendant shall clear the encumbrances of Bank of Maharashtra in respect of the suit property and within a period of six months execute the Sale Deed in favour of the Plaintiff. According to the Plaintiff, on 16th August, 2009 since the Defendant was in need of funds, he paid an amount of Rs.80,000/- to

her in cash in presence of Shri. Shivaji Shankar Patil and Rajaram Vishnu Kharade. According to the Plaintiff, when he requested the Defendant to execute the Sale Deed she started avoiding the same. The Plaintiff therefore through his Advocate issued a Notice dated 17th April, 2010 to the Defendant calling upon her to complete the sale and execute the Sale Deed in his favour. The Defendant through her Advocate replied to the said notice and denied the allegations made by the Plaintiff. However, she offered to sell the suit property to the Plaintiff for Rs.13,00,000/-. The Plaintiff therefore, filed Regular Civil Suit No.247 of 2010 before the Trial Court seeking performance of the Agreement dated 13th April, 2009 and possession of the suit property. Though the Defendant in response to the suit summons appeared before the Court and sought adjournment for filing Written Statement, she did not file any Written Statement. In view thereof, the Trial Court on 23rd December, 2010 passed an order of no written statement. On 29th March, 2011, the Defendant filed an Application for setting aside of the no Written Statement order which was allowed on 5th November, 2011, subject to payment of costs of Rs.400/-. The Defendant thereafter on 21 occasions remained absent in the matter. She neither filed her Written Statement nor paid the costs as ordered. She did not contest the suit. In the circumstances, the Trial Court after considering the oral as well as documentary evidence produced by the Plaintiff held that the Defendant had executed the Agreement to Sell the suit property in favour of the Plaintiff for an amount of Rs.9,50,000/- and though the Plaintiff was ready and willing to perform his part of

contract, the Defendant failed to do so. The Trial Court therefore held that the Plaintiff is entitled to specific performance of Agreement dated 13th April, 2009 and possession of the suit property. Accordingly, the suit was decreed by the Trial Court with costs.

4. The Defendant thereafter challenged the Judgment and Order dated 18th July, 2016 passed by the Trial Court before the District Judge, Kolhapur by filing Regular Civil Appeal No. 218 of 2015. It was argued before the Appellate Court on behalf of the Defendant that the Trial Court has not properly appreciated the facts, pleadings, evidence and legal provisions in their correct perspective and therefore, the Judgment and Order passed by the Trial Court is illegal and perverse and it is submitted by the Defendant that the matter be remanded back to the Trial Court.

5. The Appellate Court by its Judgment and Order dated 18.07.2016 has held that the Plaintiff has succeeded in proving the execution of the Agreement for Sale by the Defendant in his favour; that the Plaintiff was willing to perform his part of the contract, but the Defendant deliberately failed to do so; the Trial Court by exercising its discretion ultimately decreed the suit; there is no flaw in the impugned Judgment and Decree passed by the Trial Court on merits or otherwise; and therefore, it cannot be held that the impugned Judgment and Decree passed by the Trial Court is based on non-appreciation of pleadings, evidence and certain provisions of law or that the findings are erroneous and perverse. As regards, the submission made on behalf of the Defendant that the matter should be remanded back to the Trial Court, the Appellate

Court rejected the said submission for the reasons set out in paragraph No.15 of the Judgment which is reproduced hereunder :-

> *"15. Considering rival submissions of both parties now let us turn towards the record of present matter. The record shows that on 20.9.2010 in response to suit summons defendant appeared in the suit. Then she sought adjournments for filing written statement and ultimately on her failure, on 23.12.2010 no w.s. order was passed against her. Then on 29.3.2011 defendant filed application to set aside no w.s. order which was allowed on 5.11.2011 subject to costs of Rs.400/-. Subsequent to that at about 21 dates defendant remained absent in the matter. She neither complied the order of court of payment of costs nor contested the suit. Therefore, lastly plaintiff adduced evidence on 14.2.2012 and thereafter on 21.6.2013 suit was came to be decided. After considering the above stated circumstances it can be seen that conduct of defendant was intentionally, lethargic in not filing written statement and non contesting the suit. Her said failure could not be justified. Therefore, under these circumstances I do not find any justification in considering the submission made on behalf of appellant that matter be remanded to Ld. Trial court for de novo enquiry."*

The Appellate Court therefore dismissed the Appeal with costs.

6. The Appellant/Defendant has thereafter preferred the above Second Appeal No.916 of 2016. In the above Second Appeal, the Advocate for the Appellant has once again submitted that the suit ought not to have been decreed in favour of the Respondent/Plaintiff and the matter ought to have been remanded by the Appellate

Court for fresh hearing before the Trial Court. Both the Trial Court as well as the Appellate Court have considered the oral as well as documentary evidence led/placed before the Trial Court by the parties and have by their detailed reasoned judgments, given concurrent findings on facts namely that the Defendant had agreed to sell the suit property to the Plaintiff for an amount of Rs.9,75,000/- and though the Plaintiff was ready and willing to perform his part of contract, the Defendant failed to do so. Both the Courts have also recorded that the Appellant/Defendant has not contested the suit despite being given several opportunities and therefore, the facts pleaded and the evidence led by the Plaintiff remained uncontroverted. The Appellate Court has in Paragraph (15) of the Judgment (reproduced in paragraph (5) above), given a detailed account of the opportunities given to the Defendant, which the Defendant did not avail of and therefore, held that the question of remanding the matter to the Trial Court does not arise. Therefore, in my view, no substantial question of law arises in the matter and the above Second Appeal is dismissed with costs. The above Civil Application is also accordingly disposed off.

(S.J.KATHAWALLA, J.)