

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.581 OF 2017

Ramesh s/o Krushnarao Deshmukh and ors

..S..

Ashok s/o Janraoji Nemade

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Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders
.....

Court's or Judge's Order

Ms M.N. Hiwase, Counsel for the appellants.

Shri P.A. Dharaskar, Counsel for the respondent.

CORAM : V.M. DESHPANDE, J.

DATED : NOVEMBER 27, 2017.

1. Heard learned counsel Ms M.N. Hiwase for the appellants and learned counsel Shri P.A. Dharaskar for the respondent.

2. The only submission i.e. advanced before this Court by learned counsel Ms M.N. Hiwase for the appellants is that the Appellate Court has committed a wrong in not passing the order of remand and the Appellate Court ought to have given an opportunity to the appellants by remanding the matter.

3. The present appeal is filed by the original defendants. The respondent/plaintiff initially filed a suit for specific performance of contract against appellant No.1/defendant No.1 alone. As per the

respondent/plaintiff's case, a registered agreement was executed in between him and appellant No.1/defendant No.1 on 25.2.2004 by which appellant No.1/defendant No.1 agreed to sell agricultural property bearing Gat No.92/1 having area 1.92 HR situated at Mouja Khanwadi, Tahsil Arvi, District Wardha for total consideration of Rs.1,27,500/-. Out of said agreed amount, Rs.50,000/- were paid by the respondent/plaintiff to appellant No.1/defendant No.1 by way of earnest money. The agreed date for execution of the sale-deed was 31.12.2004. As per the respondent/plaintiff's case, on 31.12.2004 he remained present in the office of the Sub Registrar at Arvi for the entire day along with balance consideration of Rs.77,500/- for getting the sale-deed executed in his favour by appellant No.1/defendant No.1. However, he failed to appear. Subsequently, there was a meeting between him and appellant No.1/defendant No.1 on 25.12.2005 and on the said day appellant No.1/defendant No.1 obtained Rs.20,000/- towards part payment of the remaining balance consideration and for that a receipt dated 1.6.2005 was also issued and agreed to appear for execution of the sale-deed in the office of the Sub Registrar on 22.12.2005. On this day also, appellant No.1/defendant No.1 failed to appear. Therefore, on 9.1.2006 a Notice was issued by the

respondent/plaintiff to appellant No.1/defendant No.1 thereby asking him to remain present in the office of the Sub Registrar on 16.1.2006 for execution of the sale-deed after getting the balance consideration. In spite of the Notice, appellant No.1/defendant No.1 failed to appear in the office of the Sub Registrar. Consequently, the suit was filed.

4. The summons of the said suit was served upon the appellant No.1/defendant No.1. He appeared through his Advocate. During the pendency of the suit, appellant No.1/defendant No.1 executed a sale-deed in favour of one Gulabrao s/o Bholaji Dagade on 20.6.2008 in respect of the suit property. Consequently said Gulabrao was joined as defendant No.2 in the suit. The suit summons was also given to said Gulabrao and he was served with the suit summons as it could be seen from Exhibit 21.

5. In spite of service of the suit summons, for the reasons best known to Gulabrao, he failed to appear before the Trial Court. Therefore, the suit was ordered to be proceeded *ex-parte* against him. Appellant Nos.2-A to 2-E are legal representatives of said Gulabrao who expired during pendency of the appeal proceedings before the Lower Appellate Court.

6. Appellant No.1/defendant No.1 Ramesh was not only served with suit summons but also he put his appearance through his Advocate. However, he did not file any written statement. Therefore, an order against him was also passed by learned Judge of the Trial Court that the suit should proceed without filing of the written statement. Though the suit was ordered to be proceeded against appellant No.1/defendant No.1 without written statement, his Advocate actively participated in the proceeding. Not only that, submissions were also noted by learned Judge of the Trial Court.

7. It was open for appellant No.1/defendant No.1 to file an appropriate application for setting aside the order that the suit to proceed without filing of the written statement. However, nothing of that sort was done by appellant No.1/defendant No.1.

8. Predecessor in title of appellant No.1/defendant No.2 though was served with suit summons, willfully chose not to remain present in the Court of learned Judge of the Trial Court. Consequently, invited an order that the suit to proceed *ex-parte*.

9. The respondent/plaintiff entered into the

witness box and his evidence has gone unchallenged. Further, he has examined PW2 Omkar, a witness to the registered agreement of sale, and he not only proved execution of the sale agreement but also proved the receipt of the earnest amount by appellant No.1/defendant No.1.

10. It is to be noted that the agreement of sale was a registered agreement and the said agreement recites about handing over of the possession by appellant No.1/defendant No.1 in favour of the respondent/plaintiff and the said aspect is also proved by PW2 Omkar. Further, the respondent/plaintiff has proved his presence in the office of the Sub Registrar on two different dates and also proved the payment of Rs.20,000/- and the receipt executed by appellant No.1/defendant No.1 which is on record at Exhibit 29. Thus, the respondent/plaintiff has proved that he has paid Rs.70,000/- towards the sale consideration of the agreed amount of Rs.1,27,500/-.

11. Though the suit was pending and appellant No.1/defendant No.1 was appearing in the said suit, appellant No.1/defendant No.1 executed a sale deed in favour of Gulabrao s/o Bholaji Dagade, ultimately who was joined as defendant No.2. There is nothing on record to show that Gulabrao Dagade was not aware

about execution of the registered agreement between the respondent/plaintiff and appellant No.1/defendant No.1. Agreement, which is registered with the Sub Registrar, is a Notice to public at large about execution of agreement of sale between the parties. Therefore, in my view, though at this stage learned counsel Ms M.N. Hiwase tries to canvass a submission that Gulabrao Dagade purchased the property was without Notice, in my view, is misconceived.

12. Since the appellants/defendants were solely responsible for not participating in the suit proceedings, I see no justification for upsetting the well reasoned judgment of learned Judge of the Lower Appellate Court in refusing to exercise discretion under Order XLI Rule 23.

13. Consequently, no substantial question of law is involved in the present second appeal. Hence, it is required to be rejected and ultimately it is rejected. However, there shall be no order as to costs.

JUDGE

!! BRW !!

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