

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

SECOND APPEAL NO.388 OF 2017

Sanjay s/o Nilkanthrao Derkar

..vs..

Smt. Shalinitai w/o Ramdas Kasturwar

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

Court's or Judge's Order

Shri Amol Mardikar, Counsel for the appellant.

Shri A.S. Kilor, Counsel for the respondent.

CORAM : V.M. DESHPANDE, J.

DATED : NOVEMBER 16, 2017.

1. Heard learned counsel Shri Amol Mardikar for the appellant and learned counsel Shri A.S. Kilor for the respondent.

2. After the remand from this Court on 11.7.2016, the Lower Appellate Court passed impugned judgment and decree dated 9.12.2016 in Regular Civil Appeal No.47 of 2012 that gives cause to the appellant to approach this Court once again in this second appeal.

3. The appellant is the plaintiff. He filed a suit for specific performance of contract against the respondent in respect of agreement of sale-deed dated 29.3.2001 (Exhibit 50) which was pertaining to field survey No.37/1-A area 2H 5R situated at village Zari (Jamni), Taluka and District Yavatmal. Agreed consideration as per Exhibit 50 is Rs.60,000/- per acre.

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In the suit, a counter claim was also made by the respondent/defendant that the appellant/plaintiff has unlawfully dispossessed her from suit property by taking a law in his hand and, therefore, the decree of possession was claimed. The Trial Court dismissed the suit. While dismissing the suit, counter claim filed by the respondent/defendant was decreed and the appellant/plaintiff was ordered to hand over the possession of the suit field within a period of three months from the date of the order.

4. The said judgment and decree was questioned in Regular Civil Appeal No.47 of 2012. The Lower Appellate Court dismissed the appeal. The said was challenged before this Court by the appellant/plaintiff by filing Second Appeal No.448 of 2014. This Court recorded a finding that there was a concluded contract in between the parties on 29.3.2001. Therefore, it was not correct on the part of the Lower Appellate Court while disposing of the appeal filed by the appellant/plaintiff that there was no concluded contract. Therefore, the matter was remanded. After the remand also, the same fate to the extent of dismissal of appeal happened. Hence, this present appeal.

5. According to submission of learned counsel Shri Amol Mardikar for the appellant/plaintiff that both the Courts have committed a mistake in recording a finding that the appellant/plaintiff was not ready to perform his part of contract and, therefore, he has not shown his readiness and

willingness. He submits that on a day of the agreed execution of the sale-deed i.e. 30.10.2001 his bank account was having sufficient money. Not only that, on the very same day another sale-deed was executed and, therefore, he was always ready to get the agreement specifically performed. It is his another submission that the appellant/plaintiff was placed in possession by the respondent/defendant herself. Therefore, it was incorrect on the part of the both the Courts below to decree counter claim filed by the respondent/defendant.

6. Per contra, learned counsel Shri A.S. Kilor for the respondent/defendant submits that submission of learned counsel in respect of execution of the sale-deed dated 30.10.2001 has no bearing inasmuch as the sale-deed was in respect of agricultural field survey No.37/1 which was standing in the name of Ramdas, husband of the respondent/defendant and he executed a sale-deed in favour of the wife of Sanjay, present appellant. Therefore, he submits that merely because a sale-deed was executed in between those parties, that by itself does not give any presumption in favour of the appellant/plaintiff that he was ready and willing to perform his part of contract. He also submits that both the Courts below have recorded a right finding that the appellant/plaintiff has obtained forceful possession of the disputed property survey No.37/1. He, therefore, submits that the appeal be dismissed.

7. First of all, I would like to deal the issue of possession.

Agreement of sale Exhibit 50 does not have any recital that under the said agreement the appellant/plaintiff is placed in possession of the disputed land. The said agreement is not a registered agreement. Under an instrument, possession can be handed over. However, for that such instrument has to be registered is the law of this land. Further, normally no party will miss to mention in the agreement which pertains to handing over of the possession the most vital part in the concluded contract. Since there was no recital in an unregistered document Exhibit 50 about hand over of the possession, no Court will record a finding that under such agreement a vendor must have parted with possession in favour of the vendee.

8. Further, it was a firm burden on the shoulder of the appellant/plaintiff to point out as to how and under what document he was placed in possession subsequent to agreement dated 29.3.2001. There is nothing on record to show that the respondent/defendant parted possession in favour of the appellant/plaintiff legally. According to the case of the appellant/plaintiff which is also the case as submitted through his counsel before this Court, under an oral agreement the respondent/defendant has parted with possession. I have my own reservation to make any comment on such submission. Under an oral agreement, the possession is handed over is unknown to the law, especially when even the said oral agreement is not duly proved by the appellant/plaintiff. There

can be a specific performance of an oral agreement. However, the appellant/plaintiff is duty bound to prove such oral agreement.

9. In the present case, the appellant/plaintiff has utterly failed to prove the oral agreement. Therefore, in my view, both the Courts below have rightly recorded a finding by granting a decree in favour of the respondent/defendant by allowing counter claim that the appellant/plaintiff must restore back the possession in favour of the respondent/defendant since it was obtained by the appellant/plaintiff unlawfully and by taking the law in his hand.

10. Insofar as readiness is concerned, merely because the amount is lying in the bank account, is not sufficient, especially when the land in dispute was subject-matter of the land acquisition and some part was acquired from it. Therefore, on the agreed day there was no ascertainment in between the parties about exact area of the land. It is to be noted that agreement Exhibit 50 is silent about total consideration. Consideration agreed is Rs.60,000/-. Therefore, at the time of execution of the sale-deed there should be ascertainment of the area which is in possession of the respondent/defendant then only the appellant/plaintiff could have paid exact consideration for getting the sale-deed executed in his favour. Therefore, when there was no exact area known to the parties, merely because amount was available in the bank that does not mean that the

appellant/plaintiff was ready to perform his part of contract. Further, there is nothing on record that on the particular day he has withdrawn amount from that bank account and he was present in the office of the sub registrar along with amount.

11. In view of the above discussion, it is clear that the present second appeal does not involve any substantial question of law. Both the Courts below before recording finding of facts concurrently have correctly evaluated and appreciated the pleadings and evidence in correct perspective. Further, there is nothing by which this Court could record a finding that the perversity is crept in any of the impugned judgments.

12. Consequently, the second appeal must fail and is dismissed.

JUDGE

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