

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Second Appeal No.339 of 2017
[Nanakram Hargundas Jagwani & others Vs. Keshav Baburao Wahane & another]

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

Court's or Judge's orders

Ms. Deepika Kukreja, Adv., for the appellants.
Mr. A. N. Vastani, Adv., for respondent nos. 1 and 2.

CORAM : A. S. CHANDURKAR, J.

DATE : 25th September, 2017

This appeal has been filed by the original defendants who are aggrieved by the judgment of the trial Court granting a decree for a sum of Rs.5,00,000-00 in favour of the plaintiffs along with interest thereon.

According to the plaintiffs, the plaintiff no.1 on 23rd February, 2004 had entered into an agreement for purchase of three pieces of land from the defendants. It is the case of the plaintiffs that the defendants conveyed that they had title to the suit property and the same was to be sold for a consideration of Rs.5,35,000-00 per acre. Amount of Rs.3,75,000-00 was paid as earnest amount. Subsequently, amount of Rs.1,25,000-00 in addition was also paid. The defendants were to get the property measured and the sale-deed was to be executed by 5th May, 2004. In the meanwhile, plaintiff no.1 agreed to

purchase the property jointly with plaintiff no.2. Though the plaintiffs sought enforcement of the agreement, the defendants did not comply with the same. The plaintiffs learnt that the original owner of the suit property was one Kamla Bartani and, therefore, it was clear that the defendants had no title to the suit property. Hence, suit for recovery of the amounts paid was filed.

In the Written Statement filed by the defendants, it was pleaded that they had agreed to purchase the suit property of one Gopal Dhirwani who, in turn, had purchased the land from the original owner. According to the defendants, they were ready to perform their part of the agreement, but on account of inaction of the plaintiffs, the same could not be done.

The learned counsel were heard on the following substantial question of law:-

“Whether the defendants were entitled to forfeit the amount received by them as per the agreement at Exh.32?”

The trial Court after considering the evidence on record held that as the suit property was standing in the name of the earlier owner when the agreement was entered and the defendants were not the recorded owners, the plaintiffs were entitled to recover the earnest amount. It further held that though the

defendants were required to measure the suit property, they had not done so. The suit was, therefore, decreed and the appellate Court confirmed this decree.

The learned counsel for the appellants submitted that it was the plaintiffs who were at fault in not completing the transaction. It was submitted that the sale-deed was to be executed by 5th May, 2004; but it was the plaintiffs who were not ready to perform their part of the agreement. Referring to the notice dated 1st February, 2005 issued on behalf of the defendants, it was submitted that their conduct was such that the defendants intended to sell the suit property to the plaintiffs. Relying on the decision in **Shree Hanuman Cotton Mills & another Vs. Tata Air Craft Ltd.** [AIR 1970 SC 1986], it was submitted that the plaintiffs were not legally entitled to forfeit the amount of earnest. It was then submitted that the agreement at Exh.32 was insufficiently stamped and it could not have been considered in evidence. For said purpose, the learned counsel relied on the decision in **Avinash Kumar Chauhan Vs. Vijay Krishna Mishra** [2009 (4) Mh.L.J. 349].

The learned counsel for the respondents supported the impugned judgments. It was submitted that both the Courts found that the defendants were not the owners of the suit property on the day when the agreement took place. It is on that basis that a finding

has been recorded that the contract stood frustrated. As per agreement, it was for the defendants to measure the suit property and referring to the evidence on record, it was submitted that the plaintiffs were never called for measuring the same. It was then submitted that the objection as to insufficiency of the stamp on the agreement was never raised before the Courts below and, therefore, the defendants were precluded from raising the same in this Court.

I have heard the learned counsel for the parties at length and I have perused the impugned judgments.

As per the agreement at Exh.32, the plaintiff no.1 had agreed to purchase the suit property from the defendants. This agreement is dated 23rd February, 2004. It has been found by the trial Court that when this agreement was entered into, the owner of the suit property was one Kamla Bartani. She entered into an agreement with one Gopal Dhirwani and he, in turn, entered into an agreement with the defendants. It is in this backdrop that it has been held that the defendants were not competent to transfer the suit property in favour of the plaintiff no.1 and, therefore, the plaintiffs had the right to recover the earnest amount. It has not been pointed out that on the date of the agreement, the defendants had a title to the suit property. In fact, it was the stand of the defendants that the title was to be acquired from the original owner, but this could not be

done. In these facts, therefore, I find that the plaintiffs were legally entitled to receive back the amount of earnest that was paid by them. As per the decision in *Shree Hanuman Cotton Mills & another* [supra], if the transaction fails on account of any default or failure or if there is no valid title, the amount of earnest is liable to be forfeited. In the present case, the defendants had no title to the suit property and, therefore, were entitled to get back the amounts paid by them as earnest. Hence, ratio of said judgment does not assist the defendants.

In so far as the agreement at Exh.32 being insufficiently stamped is concerned, it appears that this ground was not raised either before the trial Court or before the first appellate Court. Once this agreement was exhibited as Exh.32, in view provisions of Section 35 of the Maharashtra Stamp Act, 1958, it was not permissible to take an exception to the agreement being admitted in evidence. Admittedly, the procedure prescribed by Section 58 of the said Act has not been followed. The ratio of the decision in *Avinash Kumar Chauhan* [supra] cannot be applied in the aforesaid facts.

Thus, from the aforesaid, I find that both the Courts were justified in passing a decree in favour of the plaintiffs. The substantial question of law as framed is answered by holding that the defendants were not entitled to forfeit the amount received by them as per

the agreement at Exh.32.

Hence, Second Appeal stands dismissed with no order as to costs.

Judge

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