

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

SECOND APPEAL NO.530 OF 2015

ABDUL KARIM SHAIKH CHOOTU (DEAD) THR. LRS. AND OTHERS
VS
DINKAR SAKHARAM JADHAV

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

Court's or Judge's orders

Shri S. P. Bhandarkar, Advocate for the appellants.
Shri K. S. Narwade, Advocate for the respondent.

CORAM : A.S. CHANDURKAR, J.
DATED : JULY 27, 2017.

1. In view of notice for final disposal issued on 16-1-2017, the learned Counsel for the parties have been heard on the following substantial questions of law that were framed on said date:

- (1) Whether the Courts below should have tried both the suits together so as to avoid the conflicting decree?
- (2) Whether the Courts below should have adjudicated the issue as to whether the defendant has established the readiness and willingness on his part to perform the Correct?

2. Facts relevant for considering the aforesaid substantial questions of law are that the appellants are the legal heirs of the original plaintiff. It is the case of the original plaintiff that he was the owner of agricultural land bearing Gut No.65 admeasuring 2 Hectares 15R. Out of said land,

85R land is the suit property. The plaintiff had purchased the suit property from one Yadav Gawande and another on 28-4-1986 for consideration of Rs.17,000/-. Thereafter on 8-2-1996, the plaintiff entered into an agreement of sale of the suit land with the defendant. The total consideration agreed was Rs.1,35,000/- and possession of the suit field was given to the defendant on the same day. The sale deed was to be executed on 20-4-1997. On account of pendency of another suit being Regular Civil Suit No.81/1996 the transaction could not be completed. The suit field continued to remain in defendant's possession. It is his further case that another agreement came to be executed on 12-12-1996 by the parties. Sum of Rs.48,000/- was paid and the balance amount was to be paid by 20-4-1997. Though the plaintiff requested the defendant to have the sale deed executed, the defendant refused to do so. The plaintiff, therefore, filed Regular Civil Suit No.110 of 2000 for a declaration that he was the owner of the suit field and that the documents dated 8-2-1996 and 12-12-1996 were null and void and not binding on the plaintiff.

3. In the written statement the defendant took a stand that on the basis of agreement dated 8-2-1996 he was put in possession. He was always ready and willing to perform his part of the agreement, but the plaintiff did not

execute the sale deed due to pendency of Regular Civil Suit No.81 of 1996. It was pleaded that both the parties had jointly sought permission of the Court where Regular Civil Suit No.81/1996 was pending to have the sale deed executed in favour of the defendant. This permission was, however, not granted. Ultimately, Regular Civil Suit No.81/1996 was dismissed and this dismissal was also confirmed by the appellate Court. It was further pleaded that the defendant had also filed suit for specific performance of the agreement.

4. After the parties led evidence, the trial Court recorded a finding that the agreement dated 8-2-1996 was proved. It was further held that the defendant was ready and willing to perform his part of the agreement. The subsequent agreement dated 12-12-1996 was held to be not proved. The suit came to be dismissed. The appellate Court held that only agreement dated 8-2-1996 was proved and the same was not mutually cancelled. It affirmed the finding that the defendant was ready and willing to perform his part of the agreement and thereafter proceeded to dismiss the appeal. Hence, the second appeal.

5. Shri S. P. Bhandarkar, learned Counsel for the appellants submitted that both the Courts were not justified in going into the question of readiness and willingness of the defendant to complete the contract. The aspect regarding

readiness and willingness of the defendant was not a relevant factor as the plaintiff had sought a declaration with regard to the agreements dated 8-2-1996 and 12-12-1996. According to him, by answering this question as regards readiness and willingness of the defendant, the fate of the suit that was subsequently filed by the defendant for specific performance stood decided. He further submitted that the issue as to readiness and willingness of the defendant in fact did not arise for consideration in the present proceedings. According to him, it ought to have been held that in terms of agreement dated 8-2-1996, the plaintiff was entitled for possession. He, therefore, submitted that as the defendant had filed suit for specific performance of agreement dated 8-2-1996, said suit ought to have been decided with the present proceedings. He, therefore, submitted that the suit ought to have been decreed in favour of the appellants. In support of his submissions, the learned Counsel placed reliance on the following decisions :

- (a) R. C. Chandiok & Anr vs Chuni Lal Sabharwal & Ors AIR 1971 SC 1238.
- (b) N. P. Thirugnanam vs. Dr. R. Jagan Mohan Rao & ors (1995) 5 SCC 115.
- (c) M/s J. P. Builder & Anr. Vs A. Ramdas Rao & Anr. (2011) 1 SCC 429,

to urge that the defendant was not ready and willing to perform his part of the contract.

6. Shri K. Narwade, learned Counsel for the respondent supported the impugned judgments. He referred to the pleadings of the parties to demonstrate that the issue of readiness and willingness of the defendant did arise for consideration in the present proceedings. This issue was rightly framed by the trial Court and no grievance was ever made by the plaintiff even before the first appellate Court that such issue was not required to be framed. After having contested said issue and the same having been answered against the plaintiff, he could not be permitted to urge that such issue was not required to be framed. According to him, on the basis of agreement dated 8-2-1996, the plaintiff was not entitled for possession. The subsequent agreement dated 12-12-1996 was held to be not proved by both the Courts. He also referred to the joint efforts made by both parties of seeking permission to have the sale deed executed and submitted that it was, therefore, not open now for the plaintiff to take a different stand. He thus, submitted that no interference was called for in the impugned judgments.

7. I have heard the learned Counsel for the parties at length and have perused the documents placed on record. As per the agreement dated 8-2-1996 (Exhibit-59), the plaintiff handed over possession of 85R land to the defendant by accepting an earnest amount of Rs.50,000/-. It was agreed

that the sale deed would be executed by 2nd of January, 1997. It has come on record that Regular Civil Suit No.81/1996 had been filed by the Vendors of the plaintiff and, therefore, the sale deed could not be executed in favour of the defendant. In para 4 of the plaint, it has been pleaded that on 20-4-1997, the plaintiff had requested the defendant to have the sale deed executed for which purpose the plaintiff had remained present at the office of the Sub Registrar. The defendant, however, did not turn up. Subsequently, on various occasions the plaintiff had requested the defendant to have the sale deed executed, but the defendant avoided to do so. As the defendant refused to return the possession the suit came to be filed. In the written statement it has been denied that the plaintiff had requested the defendant to have the sale deed executed. In para 9 of the written statement, it is pleaded that the defendant was all along ready and willing to perform his part of the contract. The sale deed could not be executed due to pendency of Regular Civil Suit No.81/1996 that was filed by the plaintiff's vendor. In para 10 it has been pleaded that both the parties had jointly applied before the Court that was seized in Regular Civil Suit No.81/1996 to grant permission to execute the sale deed.

8. It is in the light of these pleadings of the parties that the trial Court had framed additional issue no.9. I find

that in the light of pleadings of the parties the issue with regard to readiness and willingness of the defendant did arise for consideration. It is to be noted that according to the plaintiff he wanted to have the sale deed executed as per the agreement. The defendant with a view to justify his possession of the suit field had pleaded that it was he who was always ready and willing to complete the transaction. This defence was based on the provisions of Section 53A of the Transfer of Property Act, 1882. In view of provisions of Order XIV Rule 1 of the Code of Civil Procedure, 1908, I find that the issue as to readiness and willingness of the defendant did arise for consideration and the trial Court was justified in framing such issue.

9. Another aspect that cannot be ignored is the joint application moved by the plaintiff and the defendant vide Exhibit-71 in Regular Civil Suit No.81/1996. This application was moved on 7-2-2000 seeking permission of the Court to have the sale deed executed in terms of agreement dated 8-2-1996. This fact was also pleaded by the defendant to indicate his readiness and willingness. The plaintiff having filed suit shortly thereafter, even in that backdrop said issue did arise for consideration. Moreover, it is not shown from the record that at any point of time the plaintiff had raised any objection to the framing of said issue. No grievance was raised before

the trial Court nor does the memorandum of appeal before the first appellate Court contain such a ground. Having gone to the trial with the said issue and the same having been answered against him, the plaintiff is now estopped from urging that this issue should not have been gone into. I find merit in the submission made on behalf of the defendant that permitting the plaintiff to urge this ground would result in wiping out the findings recorded by both the Courts against the plaintiff. The decisions relied upon by the learned Counsel for the plaintiff on the aspect of readiness and willingness of the defendant do not support his case. Hence, substantial question of law no.2 is answered by holding that both the Courts were justified in adjudicating the issue as to readiness and willing of the defendant.

10. During pendency of the proceedings, the appeal challenging the dismissal of Regular Civil Suit No.81/1996 came to be dismissed. Thereafter on 16-1-2006, the defendant issued a notice to have the sale deed executed. He thereafter filed the suit for specific performance. This suit has been filed during pendency of Regular Civil Suit No.110/2000. No steps were taken to have both the proceedings decided together till the suit filed by the plaintiff was ultimately decided on 19-8-2006. No such attempt was also made during pendency of the appeal before the first

appellate Court. As it has been found that the issue as to readiness and willingness arose for consideration in the present proceedings and the same was contested by both the parties by leading evidence on that aspect, in these facts, I do not find that the subsequent suit filed by the defendant ought to have been tried with the earlier suit. There is no question of any conflicting decree being passed inasmuch as in the present suit possession of the suit property is sought on the ground that agreements dated 8-2-1996 and 12-12-1996 were null and void. The question whether the defendant in the suit filed by him has made out any case for grant of relief of specific relief is a matter to be decided on merits in those proceedings. Hence, I do not find that in these facts both the suits ought to have been tried together. Substantial question of law No.1 stands answered accordingly.

11. In the result, I do not find that any case has been made out to interfere at the behest of the appellants. The second appeal is accordingly dismissed with no order as to costs.

JUDGE