

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

SECOND APPEAL NO.597 OF 2017

Pravinbhai s/o Shivjibai Ruparel and anr

..vs..

Komal d/o Tikaram Chamat and ors

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

Court's or Judge's Order

Shri N.S. Deshpande, Counsel for the appellants.

CORAM : V.M. DESHPANDE, J.

DATED : NOVEMBER 16, 2017.

1. Heard learned counsel Shri N.S. Deshpande for the appellants.

2. By the present second appeal, the appellants are questioning judgment and decree passed by learned Principal District Judge at Gondia in Regular Civil Appeal No.17 of 2016 dated 16.8.2016 by which the appellants' appeal is dismissed thereby upholding order passed by the executing Court in Regular Darkhast No.6 of 2005 by which objections raised by the present appellants were rejected by the said executing Court.

3. According to learned counsel Shri N.S. Deshpande for the appellants that opportunity of adducing evidence is not given to the present appellants and boundaries in respect of property purchased by the present appellants are not identical with suit property.

4. One Komal d/o Tikaram Chamat entered into an agreement of sale in respect of suit property on 5.5.1984 with Shri

Rekhlal s/o Jaipal Bohane, the predecessor-in-title of present respondent No.2-A and 2-F. The vendee was required to file a suit for specific performance of contract against Rekhlal. The said suit was registered as Regular Civil Suit No.18 of 1985. During pendency of the said suit for specific performance of contract, Rekhlal executed a sale deed on 30.12.1988 in respect of the suit property in favour of one Sushilabai Mishra from whom the present appellants have purchased the suit property subsequently. Said Sushilabai Mishra was, therefore, made party defendant No.2 in Regular Civil Suit No.18 of 1985. The parties went on trial. Vide judgment and decree dated 19.7.1995, the Trial Court partly decreed the suit and granted the decree of refund of earnest money in favour of the plaintiff. Feeling aggrieved by the said, the plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure and the said was registered as Regular Civil Appeal No.65 of 1997. The Lower Appellate Court on 31.8.2004 allowed the appeal and thereby decree of specific performance of contract was granted in favour of the plaintiff.

5. Sushilabai Mishra, vendor of the present appellants, then carried a second appeal before this Court being Second Appeal No.55 of 2005. In the said second appeal, challenge was set up against the issue and decree passed by the Lower Appellate Court granting decree of specific performance of contract. This Court on 17.6.2008 was pleased to dismiss the second appeal filed by Sushilabai Mishra. A statement is made at bar by learned counsel Shri N.S. Deshpande for the appellants that no further proceeding was carried before the Honourable Apex Court. With the result, the

decree of specific performance of contract attained its finality.

6. It would be pertinent to note that during the pendency of Second Appeal No.55 of 2005, Sushilabai executed sale deed of the suit property in favour of the appellants on 24.4.2006. After dismissing the second appeal, execution proceedings were initiated by the plaintiff and those execution proceedings were registered as Regular Darkhast No.6 of 2005. In the said execution proceedings, the appellants raised objections under Section 47, Order XXI Rules 97 and 151 of the Code of Civil Procedure. The objections were duly considered by the executing Court and vide order dated 7.3.2015 the objections were rejected. Thereafter, the objectors, the present appellants filed a Regular Civil Appeal No.17 of 2016 before learned Principal District Judge at Gondia and the said was dismissed.

7. According to learned counsel Shri N.S. Deshpande for the appellants, the Courts below have failed to give an opportunity to the appellants to show that he is *bona fide* purchaser of the suit property without Notice. It is also his submission that boundaries in the decree and the boundaries as mentioned in the sale deed are not matching with suit property. Besides this, no other submission was advanced before me.

8. Insofar as *bona fide* purchaser without Notice is concerned, the said burden rests on the shoulder of the appellants, the objectors since it is their case that when they purchased the suit property for valuable consideration they were unaware about the fact of pendency of the second appeal before this Court. Therefore, it was for the appellants to prove the said fact. To a pointed query

being put to learned counsel Shri N.S. Deshpande for the appellants, learned counsel failed to give any affirmative answer as to whether in spite of the prayer being made before the executing Court for leading evidence in that behalf the permission was refused. Thus, though opportunity was available to the appellants to adduce evidence, it is appellants who have failed to avail the said opportunity and thus they have failed to discharge the burden on them.

9. In that view of the matter, the contention raised by learned counsel Shri N.S. Deshpande for the appellants before this Court, that opportunity was not given to the appellants to prove that they are *bona fide* purchaser without Notice, is misconceived and the said submission is rejected.

10. Insofar as mis-matching of the boundaries is concerned, it is purely a finding of fact. Both the Courts below have recorded findings on the basis of the material available on record. It could not be said that said findings are perverse.

11. In that view of the matter, no substantial question of law involves in the present second appeal. The appellants only want to re-appreciate the findings of facts afresh which in my view is impermissible under Section 100 of the Code of Civil Procedure. Hence, the second appeal is rejected.

JUDGE

!! BRW !!

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