

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 23 OF 2017
AND
CIVIL APPLICATION NO. 3209 OF 2017

Ghanshyam S/o Balchand Ahuja,
Age : 64 years, Occu.: Business,
R/o : Parbhani,
Through GPA Dinesh Ghanshyam Ahuja
Age 38 years, Occu.: Business,
R/o Ahuja Complex, Flat No.1,
Basmat Road, Parbhani

.. Appellant
(Orig. Plaintiff)

Versus

1. Narhari S/o Pandurang Kale
Died through his LRs.
- 1-1 Vimal W/o Narhari Kale,
Age : 63 years, Occu.: Household,
R/o Ahuja Complex, Plot No.11,
Basmat Road, Parbhani
- 1-2 Jagdish S/o Narhari Kale,
Age : 38 years, Occu.: Business,
R/o. Ahuja Complex, Plot No.11,
Basmat Road, Parbhani

**..Respondent no. 1-2 is deleted as
per Court's order dated 28-07-2017**

- 1-3 Nagesh S/o Narhari Kale,
Age : 36 years, Occu. : Business,
R/o. Ahuja Complex, Plot No.11,
Basmat Road, Parbhani
- 1-4 Rajesh S/o Narhari Kale,
Age : 33 years, Occu.: Business,
R/o. Ahuja Complex, Plot No.11,
Basmat Road, Parbhani

1-5 Umesh S/o Narhari Kale,
Age : 30 years, Occu.: Education,
R/o. Ahuja Complex, Plot No.11,
Basmat Road, Parbhani

1-6 Trupti D/o Narhari Kale,
Age : 27 years, Occu.: Education,
R/o Ahuja Complex, Plot No.11,
Basmat Road, Parbhani

2. Kum. Shantabai D/o Pandurang Kale,
Age : 40 years, Occu.: Household,
R/o. Ahuja Complex, Plot No.11,
Basmat Road, Parbhani

.. Respondents
(Orig. Defendants)

...
Mr. Milind M. Patil (Beedkar), Advocate for appellant
Mr. M.P. Kale, Advocate for respondents no. 1-1, 1-3 to 1-6 and 2
Respondent no.1-2 deleted vide court's order dated 28-07-2017
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 03-04-2018

ORAL JUDGMENT :

1. Plaintiff in special civil suit no. 89 of 2008 is before this court taking exception to order passed by appellate court in regular civil appeal no. 49 of 2013 dated 13-01-2017 whereunder appellate court has sent back the matter, restoring special civil suit no. 89 of 2008 for trial afresh.

2. Learned counsel Mr. Milind M. Patil - Beedkar appearing for appellant - original plaintiff with quite some vehemence

submits that observations by appellate judge are absolutely incompatible with the operative order.

He submits that the plaintiff constructed three storied building and had offered flats for sale in the same. Flat no. 11 from the same had been intended to be purchased by original defendant no.1 and accordingly an agreement had been executed. Pursuant to terms, consideration agreed upon had been Rs.4,58,000/- and the defendant had paid towards earnest amount, a sum of Rs.5001/- and had agreed to pay rest of the consideration at the time of registration of sale deed expected to be executed before 28-12-1999.

Plaintiff had also been a dealer in electric equipments and defendant no. 1 on 09-02-1999 had made purchase from said dealership. Defendant no.1 had paid a sum of Rs.1,00,000/- deducting the cost of electrical equipments of Rs.35,000/-, balance of the amount paid in respect of transaction of purchase of flat had been only Rs.65,000/-. Subsequently, the defendants purportedly issued cheques of Rs.2,00,000/- and Rs.1,00,000/-, respectively, in March, 1999. Cheques were dishonoured.

3. With the mediation of one advocate Mr. Somani, the plaintiff had resiled to the request and he was prevailed over to deliver possession of the flat to defendant no.1.

4. The property of the plaintiff had been encumbered with finance from bank and plaintiff had been consistently under its burden. In the meanwhile, Jintur Urban Co-operative Bank had initiated recovery proceeding against plaintiff for repayment of loan. Plaintiff had mortgaged house property with the bank. The repayment of loan was expected to be made from sale of flats and in order to stall taking over of possession of the plaintiff's property, it was necessary to repay the amount of loan. The plaintiff had to approach this court in writ petition wherein he had to submit an undertaking that he will deposit the amount of the bank after selling flats. The bank had issued a letter to the plaintiff to honour the undertaking.

5. His married daughter had salvaged the situation to some extent by agreeing to purchase the suit property and had paid certain amount and the bank accordingly had issued no-objection certificate.

6. District Consumer Redressal Forum dismissed the complaint attempted by defendant no.1 against the plaintiff.

7. Defendant no.1 had failed to pay remaining consideration. Since defendant no.1 had failed to pay the amount

and had retained unauthorizedly the possession of the suit property, the suit ensued for possession. It had been referred to that defendant no.1 had later shifted to Gangakhed, however, defendant no.2 had been residing in the suit flat.

8. Defendants no. 1 and 2 purported to resist the suit. They sought protection pursuant to section 53 of the Transfer of Property Act. Defendants contend that the plaintiff had assured the purchasers about good quality of flat but the flat had not been ready. In the meanwhile, the defendants went on making several payments in March, 1999 and have stated that they have paid total consideration. It is contended, defendants had raised the amounts by obtaining loan from Sangli Urgan Co-operative Bank and had paid consideration to the plaintiff.

9. On the basis of aforesaid pleadings, various issues had been framed.

10. Trial court had recorded oral as well as documentary evidence adduced by the plaintiff. Defendants despite given various opportunities, failed to adduce oral or documentary evidence and ultimately the court had decreed the suit under judgment and decree dated 04-03-2013.

11. Against said judgment and decree, original defendants - appellants in regular civil appeal no. 49 of 2013 preferred appeal.

12. Learned counsel for the appellant submits that the appellate court, in fact, has observed in paragraph no. 22, as under:-

" 22.

Minutely perusing Roznama and record and proceeding of Special Civil Suit No. 89/2008, it is crystal clear that, learned Trial Court had given lots of opportunity i.e. sufficient opportunity to appellants to adduce their oral and documentary evidence. But appellants by hook or crook only with intention to prolong this matter failed to adduce their oral and documentary evidence before the learned Trial Court."

He further refers to paragraph 26, which reads, as under:-

" 26. Thus, considering the rival submissions which submitted by both sides learned counsels. As well as considering the provisions of Order XLI Rule 23 of C.P.C. (O.41 R.23) and **minutely perusing record and proceeding of Special Civil Suit No.89/2008 along with Judgment and decree which passed by learned Trial Court on 4.3.2013. As well as minutely reading the order of Writ Petition which passed by Hon'ble Bombay High Court in Writ Petition No.7006 of 2012. Firstly it appears that, learned Trial Court had given sufficient opportunities to appellants for adducing their oral and documentary evidence. As well as in view of order of Writ Petition No.7006/2012 of Hon'ble High Court, reveals that learned Trial Court had given sufficient opportunity to appellant for adducing their oral and documentary evidence.**

*As well as Hon'ble Bombay High Court in view of order of Writ Petition No.7006/2012 also given opportunity to appellants to adduce their oral and documentary evidence before the learned Trial Court. **But appellants failed to adduce their oral and documentary evidence.** "*

He submits that aforesaid observations have suddenly veered around, later in paragraph 26, it has been observed, thus :-

" Then also minutely reading the Judgment/decreed which delivered by learned Trial Court on 4.3.2013 in Special Civil Suit No.89/2008 and considering the pleading of both the parties. It appears that, the aspects which are involved in this matter/litigation are factual aspects which can be very well determined only by considering the oral and documentary evidence of both the parties. Hence I hold that, for the purpose of proper adjudication and settling the real controversy between the parties and for ends of justice, it is required and necessary to remand this matter for retrial/reconsideration. Although on the part of appellants disclosing/showing negligence as regards adducing their oral and documentary evidence. "

13. He submits that in the background of aforesaid, further observations in paragraph 30 are untenable, reading, thus :-

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.....*

only for the purpose of proper adjudication of original dispute between the parties which is having by way of Special Civil Suit No.89/2008.

As well as for the purpose of fair trial, I come to conclusion to remand this matter for retrial/reconsideration. "

14. Learned counsel submits that perusal of the judgment would show that there had been no case of whatsoever nature on behalf of the original defendants that, they are in fact possessed of any evidence in support of their claim nor any application for adducing evidence had been before appellate court. In such a scenario, the case which had never been submitted or pleaded is being made out and being considered by appellate court. He further submits that even otherwise, it is not a case that appellate court is not empowered to deal with the matter and take evidence. He submits that evidence, if any, could have been considered by appellate court and it had not been necessary to remand the matter specially on the background having observed that the defendants have been vexing and harassing not only the plaintiff but court as well. He, therefore, urges to allow the appeal from order and set aside impugned order passed by appellate court.

15. Learned counsel Mr. Mahesh Kale appearing for respondent nos. 1-1, 1-3 to 1-6 and 2 submits that the appellate court has appropriately considered the matter. Defendant no.1 had paid whole of the consideration amount on various occasions mentioned in the appeal and for the purpose of proving the same, it is necessary to remand the matter to the trial court. He submits it has been specially considered that agreement is of 1999 and the

suit has been filed in 2008 and, as such, issue of limitation arises, which is a mixed question of law and fact. He submits that various factual and legal aspects are involved in the matter and will have to be properly adjudicated by giving opportunity to the defendants. The matter according to him, requires adjudication at the trial stage. He, therefore, supports the order of remand.

16. Earlier on before this court, an offer had been given on behalf of the plaintiff that let defendants deposit certain amount without prejudice to claim of parties and amount shall remain in the court. His contention is that perpetration of litigation is at the instance of non *bonafide* defendants. Defendants want to keep possession of the property unauthorizedly and while away time and whereas plaintiff is economically hard pressed and is in dire need of possession of the property.

17. In order to see that the attempt by original defendants are *bonafide* and genuine, few opportunities had been given to show *bonafide*, however, appearance had not been caused on couple of occasions and an order had been passed on 27-03-2018 giving last opportunity. Learned counsel Mr. Mahesh Kale submits, however, the defendants are not in a position to deposit any amount.

18. On the whole, it appears that factual position underlying the observations of appellate court referred to earlier has not been disputed on behalf of the defendants that despite several opportunities to adduce oral and documentary evidence, no oral or documentary evidence had ever been produced. Further, during pendency of suit, order of the trial court had been challenged by defendants before this court since the order of trial court, according to them, had deprived opportunity to them, to lead evidence. This court under its order in writ petition no. 7006 of 2012 had granted opportunity to the defendants to lead evidence, however, despite order by this court, the defendants have not availed several opportunities coming their way subsequently. The trial court, in the circumstances, had to go on with the suit and decide the same. Further, it appears that even during pendency of appeal, defendants have not made any application therein or any other attempt to adduce evidence or appear to have put up any material before the appellate court to show that they are indeed in possession of evidence worth pressing into service. It is simply being submitted that opportunity should be given to adduce evidence without producing any material lending credence to their such submission.

19. In the circumstances, the observations and the considerations of the appellate court, that an opportunity should be given to the defendants to lead evidence, turns out to be vacuous and based on hypothetical guess work. While the appellate court has made certain scathing observations against defendants, in such a case, it would have been imperative to verify as to whether defendants' claim with regard to opportunity to adduce evidence, had any credibility. Without there being substance infused in the claim for adducing evidence, it does not appear that the impugned order is tenable.

20. In the circumstances, appeal from order is allowed. The impugned order is set aside. Regular civil appeal is restored.

21. It is expected that regular civil appeal no. 49 of 2013 would be proceeded with expeditiously, keeping in view the time frame which had been earlier on prescribed to the trial court for disposal of the suit.

22. In view of disposal of appeal from order, civil application no. 3209 of 2017 stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

arp/