

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 454 OF 2017
WITH
CIVIL APPLICATION NO. 344 OF 2017
IN
SA NO. 454 OF 2017**

1. Smt. Varsha Vijay Ambardekar & Ors. ... Appellants.

V/s.

1. Mrs. Shruti Aniket Shintre & Anr. ... Respondents.

Mr. Champawalla Abdul Waheed, Advocate for the Appellants.

Mr. Prathamesh Kamat, Advocate a/w. Ms. Debashree Mandpe i/by
Ganesh & Co. for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : JUNE 14, 2018.

P.C. :

1 Heard learned counsel for the Appellants and the Respondents.

2 By this second Appeal, an exception is taken to the judgment and decree passed by the Court of Ad-hoc District Judge-1, Thane in Regular Civil Appeal No. 80 of 2016, thereby dismissing said Appeal on 13.01.2017. The Appeal was preferred against the judgment

and decree dated 15.02.2014 passed by the Court of Civil Judge, Senior Division, Thane in Special Civil Suit No. 356 of 2010.

3 The said suit was filed by the Plaintiffs, the Respondents herein, for specific performance of the agreement dated 16.05.2007, under which the Appellant's predecessor, original defendant, has agreed to sale the suit flat to the present Respondents for total consideration of Rs. 15,75,000/-, out of which an amount of Rs. 3,10,000/- was paid by cheques and those cheques were received in cash by the original Defendant i.e. the predecessor of the present Appellants. The agreement of sale was registered and as per the terms and conditions of the agreement, remaining amount of Rs. 12,65,000/- was to be paid in two installments and first installment of Rs. 6,00,000/- was to be paid by 01st June, 2007; whereas the second installment of Rs. 6,65,000/- was to be paid on 10th June, 2017. As per clause 8 of the agreement, the appellant / defendant had agreed to deliver original documents of the Flat within two days to the ICICI Bank for disbursing the loan and after the whole payment, the Defendant was to hand over the possession of the suit

flat to the Plaintiffs, the present Respondents. However, the Appellant/defendant failed to deliver original documents within two days to the ICICI Bank, therefore, the Respondents sent a registered notice to the Appellant on 28.05.2007, requesting the appellant to do the needful. The Appellant received the notice but did not reply, therefore, second notice was issued to the appellant by the respondents. But said notice was, however, returned with endorsement of “unclaimed”. By that time, the loan was sanctioned by the ICICI Bank. However, as the Appellant did not perform his part of contract, of delivering the original documents of flat to the ICICI Bank, the Respondents/Plaintiffs were constrained to file the Suit for specific performance of agreement on 16.05.2007.

4 In the suit, the original defendant appeared and contested it by filing written statement at Exh. 15 dated 05.10.2010. In para no. 5 of the written statement, it was categorically admitted by the defendant that he has entered into and executed the suit agreement dated 16.05.2007 in respect of the flat in question under the terms and conditions mentioned therein. It was further admitted that he

has received various cheques, as also the cheque of Rs. 3,10,000/-. However, it was denied that the Respondent was ready and willing to perform his part of the contract. That was the only contention raised in the written statement by the defendant.

5 On the respective pleadings of the parties, the trial court framed necessary issues and in support of his case, affidavit of examination-in-chief was filed by Plaintiff alongwith the documents. Then the matter was adjourned repeatedly for cross-examination of the Plaintiff. Particulars thereof are given in para number 5 of the appeal court's judgment, wherein it is stated that the examination-in-chief of the Respondent No. 1 was completed on 11.12.2013 and the matter was adjourned to 09.01.2014 for cross-examination by the appellants / defendant. But on the said date, the appellant and his Advocate did not remain present hence, the matter was kept for argument on 17.01.2014 and then after considering the entire material on record, the trial court has pronounced its judgment on merits on 15.02.2014 and decreed the suit for specific performance of the contract.

6 This judgment of the trial court was taken in Appeal by the original defendant alongwith the application of condonation of delay. That application for condonation of delay was allowed in January, 2016 and, thereafter within two months the original defendant expired. Before the first Appellate Court, legal heirs of the original defendant, the present Appellants had argued the matter on merits and also a request was made by the appellants to remand the matter to trial court, on the ground that the original defendant was not given opportunity to cross-examine the plaintiffs/respondents or to adduce his evidence.

7 The Appellate Court, however, having regard to the fact that the matter was adjourned repeatedly for cross-examination of the Respondents and thereafter, also for the original defendant to adduce the evidence, rejected the said prayer of remand and after going through the merits of the matter, found that there was no case made out for remand of the matter, as the defendant has admitted execution of the agreement and has also admitted the receipt of the part payment on installments and as regards the readiness and

willingness on the part of the respondent, it was found by the first appellate court that there was no sufficient evidence on record to that effect. An attempt was made before the appellate court by the present appellants, who are legal heirs of the original defendant, to contend that the signature of the original defendant appearing on the agreement is forged one. The said contention was rejected by the appellate court by holding that it was not raised by the original defendant but he has unequivocally admitted the execution of the agreement of sale.

8 While challenging this judgment of the first appellate court, the submissions of the learned counsel for the Appellants are twofold. In the first place, it is submitted that the judgment and decree passed by the trial court is as good as an ex-parte decree as no opportunity was availed by the original defendant to cross-examine the respondents and to adduce his evidence. In support of his submission, learned counsel for the appellant / defendant has relied upon the judgment of the Apex Court in the case of **Prakash Chander Machanda & Anr. vs. Smt. Janki Manchanda**, reported

in AIR 1987 Supreme Court 42, wherein, after considering the provisions of Order 9, Rule 13 of the CPC and order 17, Rule 2 and 3 of the CPC, it was held that if, at the time of hearing of the suit, defendant remains absent, then the court can proceed ex-parte under Order 9 Rule 13 of the CPC and and thereafter, the defendant can file application for setting aside the said ex-parte decree.

9 In my considered opinion, even the cursory perusal of this judgment goes to show that the issue raised before the Apex Court therein was totally different as to whether the application under Order 9, Rule 13 of the C.P.C. can be maintainable if the decree is passed under order 17, Rule 3 of CPC and it was answered in affirmative.

10 Here in present case, the appellant has not preferred any application for setting aside ex-parte decree under Order 9 Rule 13 of the CPC but has preferred the appeal as the judgment was passed by the trial court on merits, after going through the contentions raised by the defendant in the written statement and after having

regard to the evidence adduced by the respondents. In view thereof the ratio of the judgment of the Hon'ble Supreme Court in this case cannot be applicable to the facts of the present case.

11 Learned counsel for the Appellants has then relied upon the Judgment of the Hon'ble Apex Court in the case of **M. K. Prasad vs. P. Arumugam** AIR 2001 S.C.2497, wherein the Application was filed for setting aside ex-parte decree and it was held that while deciding such application, the court should keep in mind the judgment impugned, extent of the property involved and stakes of parties. In that context, it was held that the conduct of the litigant, who suffers on account of negligence on the part of his Advocate, should not be castigated; as the inconvenience caused to the opposite party can be compensated by awarding costs. In peculiar facts and circumstances of that case, it was held that the delay in preferring such application under Order 9, Rule 13 of C.P.C., needs to be condoned. Therefore, in my considered opinion, this judgment also cannot be helpful to the Appellant in the facts of the present case.

12 Learned counsel for the Appellants has then relied upon the landmark judgment of the Hon'ble Apex Court in the case of **Sangram Singh vs. Election Tribunal, Kotah**, AIR 1955 S.C. 425, wherein the Apex Court has highlighted the fact that Code of Procedure is something designed to facilitate the justice and further its ends. It is not a penal enactment for punishment and penalties, not a thing designed to trip people up. Therefore, too technical a construction of Sections that leaves no room for reasonable elasticity of interpretation should be guarded against, lest the very means designed for the furtherance of justice will be used to frustrate it.

13 These observations were made by the Apex Court in the context of setting aside the ex-parte decree. However, the Apex Court at the same time has made it clear that none of the party should suffer on account of the technical approach, just as the party who has committed negligence should not suffer; similarly the party who has remained diligent also should not suffer, then only the justice can be said to have been done.

14 Here in the present case, in the first place, the Appellant has not filed application for setting aside the ex-parte decree, as the appellant was fully aware that it was not an ex-parte decree in the strict sense of the sense but it was a decree passed by the trial court on merits, after considering the written statement and also the evidence of the respondents-plaintiff. Therefore, the appellant has challenged the judgment and decree of the trial court by preferring the first appeal. No doubt, he has made a prayer for remanding the matter in the first appeal but then such remand cannot be allowed easily or for mere asking, unless it is shown that on account of certain unavoidable circumstances, the appellant could not remain present before the trial court.

15 Here in the case it is pertinent to note that the original Appellant has, in the trial court, engaged his Advocate filed his written statement and, thereafter he had remain absent. Evidence of Respondent was completed on 11.12.2013 and even prior thereto, on two dates i.e. on 06.09.2013 and 20.11.2013 the Appellant had remained absent. On 11.12.2013, the Appellant's

Advocate remained present and he was given copy of the examination -in-chief of Respondent. On that day the purshis was filed that the Plaintiffs/Respondents are closing the evidence and the matter was kept on 09.01.2014. The Appellant, original defendant, however remained absent on that date and hence, the matter was adjourned on 17.01.2014. On that date also, the original defendant and his Advocate remained absent. Thereafter, the matter was adjourned to 23.01.2014 but again the original defendant remained absent and ultimately on 15.02.2014, the trial court was constrained to decree the suit after going through the merits of contentions raised by both the parties.

16 In the backdrop of these facts, no fault can be found with the learned Judge of the first Appellant court, who was pleased to reject the request of remand.

17 Moreover this request of remand could have been accepted if the original defendant has raised some grounds to contest the suit of the respondents. It is pertinent to note that in the written statement

itself, the original defendant has admitted execution of the agreement. Not only that, he had also admitted to have received the part consideration of amount. As per the terms and conditions of the agreement, it was for him to deliver original documents of the flat to the ICICI Bank within two days for disbursing the loan. The plaintiff/ respondent has immediately on 28.05.2007 issued the notice to him on failure of the original defendant to submit such documents. The original defendant has received the notice from the plaintiff but he had not bothered to reply and /or to comply therewith.

18 The first installment, out of remaining consideration amount, was to be paid by 01.06.2007. However, prior to that, there was no compliance made by the original defendant of submitting the original documents to the ICICI Bank. As he has not done so, the plaintiffs/Respondents had issued notice dated 28.05.2007 so that the first installment of consideration can be paid 01.06.2007. The original defendant has, however, not complied with it. Then second

notice was issued on the same address but the it returned 'unclaimed' which had resulted in filing the suit by the plaintiff.

19 Even after the suit was filed, the conduct of the original defendant shows that he has not remained diligent in contesting the same or remained present before the court when it came for hearing. It was very much expected on his part to do so. Now the entire blame cannot be shifted on his Advocate to submit that for negligence of the Advocate, the litigant should not suffer. It is also the duty, obligation and expectation from the litigant that it is his lis and therefore, he should take care of that lis. If he does not to do so, then now he cannot say that he should be given one more opportunity to defend the matter and that too after the period of 8 years, seeking remand of the matter.

20 More over one may have remanded the matter if there was some issue to be resolved or to be decided. Here in this case, the original defendant himself has admitted execution of the agreement and as per the terms and conditions thereof, he has received the

part consideration. The failure on his part to submit the documents to the ICICI Bank, and, thereafter, non-reply to the notice in that regard goes to show intentional non-performance of the agreement. Whether the respondent was ready and willing to perform his part of the contract was the only fact challenged in the written statement, and that fact is also proved from the notice which was given by the Respondent immediately on 28.05.2007. Therefore, there is nothing much to be adjudicated, in view of the clear evidence and admission on the part of the original defendant on record.

21 It is pertinent to note that though the original defendant had admitted the execution of the agreement, the present appellants, who are his legal heirs, have for the first time, in the first appellate court raised the contention that the signature of the original defendant on the said agreement is forged one. Needless to say that the such defence cannot be available to the present appellants, in the appeal as it is the fact that their predecessor, the original defendant, has not raised this defence but categorically admitted the execution of the agreement.

22 In such situation therefore, there remains nothing to be decided at the hands of the court. Hence, merely for the sake of asking, the matter cannot be remanded back. It is true that justice should not only be done but it should also appear to have been done. But it cannot be applied to one party only. Here the respondents have contested the matter and waited for specific performance of the agreement of contract and possession of the flat from the year 2007 when the agreement was executed. He has taken all the steps to contest the litigation in time but on one pretext or the other, the original defendant, his legal heirs, the present appellants are nullifying their efforts. Then it clearly does not lie in their mouth to say that the matter should be remanded so that the justice should be done.

23 Thus there is absolutely no merit in the contention raised in the second Appeal much less no substantial question of law is raised or involved therein, as as to admit the same.

24 Hence, the Appeal stands dismissed at the stage of admission itself.

25 In view of the dismissal of the appeal itself, nothing survives in civil application no.344 of 2017 and the same is disposed of as such.

26 At this stage the learned counsel for the appellants seeks stay of this order for a period of two months. Learned counsel for the Respondents opposes the request on account that there is no stay granted or in existence to the execution of the decree even during the pendency of the first appeal or second appeal.

27 In my considered opinion, in view of the concurrent findings arrived at by the trial court, the first appellate court and this court as well in the second appeal, there is no case made out for grant of stay to the implementation of this decree. Hence, the request to stay the decree is rejected.

[DR.SHALINI PHANSALKAR-JOSHI, J.]

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