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

**SECOND APPEAL NO. 422 OF 2017
WITH
CIVIL APPLICATION NO.1203 OF 2015
IN
SECOND APPEAL NO. 422 OF 2017.**

Shivaji B Madavkar ... Appellant.

V/s.

Jalindar Tukaram Tupare
and ors ... Respondents

Mr. Sugandh B. Deshmukh, for appellant.

Mr. Drupad S. Patil, for respondent No.1.

Mr. Dormaan J. Dalal, for respondent No.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 11th JUNE, 2018.

P.C. :

1] Heard learned counsel for appellant and respondent.

2] In this Second Appeal, the exception is taken to the judgment and decree passed by Ad Hoc District Judge II, Kolhapur, dated 29.10.2014, in R.C.A.No.275 of 2007, thereby dismissing the said appeal, which was preferred against the judgment and decree dated 28.8.2007, passed by Civil Judge Junior Division, in R.C.S.No.70 of 1999.

3] The said suit was filed by respondent No.1 for specific

performance of the contract, against respondent No.2 and the present appellant, who is original defendant No.2 and claims to be subsequent purchaser on the basis of registered sale deed dated 7.1.1999.

4] Both the trial Court and the Appellate Court have come to the conclusion that the appellant is not a bonafide purchaser, and as respondent No.1 has proved his readiness and willingness to perform his part of contract, respondent No.1 is entitled to get decree for specific performance of contract.

5] The submission advanced by learned counsel for appellant is that both the trial Court and Appellate Court had not considered the fact that the agreement of sale dated 1st August, 1999 on the basis of which respondent No.1 is seeking possession is un-registered. It is submitted that when as per case of respondent No.1 himself, he has received possession of the suit property, then such agreement has to be compulsorily registered. To support this submission, reliance is placed on the judgment of the Hon'ble Apex Court in the case of **Avinash Kumar Chauhan -vs- Vijay Krishna Mishra [(2009) 2 SCC 532]** to submit that when in the agreement, possession of the immovable property is delivered, then such agreement is required to be registered.

6] However, in this respect both the trial court and appellate Court held that there is no recital in the agreement of sale that

possession was delivered on the date of agreement. However, it is appellant himself, who has admitted in his cross examination that the respondent No.1 plaintiff is in possession of the suit land.

7] In view thereof, if the possession was not at all delivered on the basis of agreement of sale, but it was obtained subsequently, no fault can be found in the agreement if it is not registered. The position of law is very clear to that effect, as spelt out in Proviso to Section 49 of the Registration Act, which exempts agreement of sale from the clutches of compulsory registration.

8] As regards the contention that the appellant is not bonafide purchaser, both the trial Court and the appellate Court have on appreciation of entire oral and documentary evidence on record in its proper perspective found that, only after respondent No.1 issued notice dated 22.6.1999, respondent No.2 executed sale deed in favour of the appellant on 7.7.1999 and that too for consideration which is much below the consideration for which land was agreed to be sold to respondent No.1. Hence, both the Courts have also properly concluded that such agreement of sale cannot be called as bonafide. The appellant has also not issued any public notice before executing the said registered sale deed. The case put up that he was in possession by way of mortgage is also disbelieved properly by both Courts, as alleged deed of mortgage was not produced and learned

counsel for appellant has also fairly admitted before first Appellate Court that there is no evidence in support of the plea of mortgage.

9] The last submission that respondent No.1 has not sought the declaration that sale deed of appellant is illegal and not binding, this aspect is also considered by the trial Court and the appellate Court and by relying upon judgment of this Court in the case of **Dilip Bastimal -vs- Baban Bhanudas [2001 (3) Mh. L.J. page, 730]**, rejected the same holding that it is not necessary at all to seek specific declaration against the subsequent transferee.

10] Thus, as all the factual aspects of the case are properly considered by both the Courts below, no case is made out for admission of the Appeal especially when no substantial question of law is raised. The appeal, therefore, stands dismissed at the stage of admission itself.

11] In view of disposal of appeal, Civil Application No.1203 of 2015 stands disposed off.

[DR.SHALINI PHANSALKAR-JOSHI, J.]