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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL No. 690 OF 2014

Dilip Moreshwar Mone ... Appellant
Vs.
Girish Balkrishna Dandekar & Anr. ... Respondents

Mr. Kilpady Prakash Narayan, Advocate for the appellant.
Mr. Mohan D. Samel, Advocate for respondent nos. 1 and 2.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 1st February, 2018.

ORDER:

The Appeal is admitted on 7th July, 2014. The parties are senior citizens, hence heard.

2. This Appeal is directed against the judgment and order dated 11th April, 2014 passed by the learned Judge of the City Civil Court, Greater Mumbai thereby decreeing S.C. Suit No. 9374 of 1995 (High Court Suit No. 1582 of 1995). The respondents/plaintiffs have filed the suit for specific performance of Agreement of Sale dated 16th July, 1992 (Exhibit 14) in respect of Flat No. 306 situate on the 3rd floor of Sheetal Apna Ghar Cooperative Housing Society, Samarthan Nagar, Lokhandwala Complex, Andheri (West). The facts of the case, in brief, are as follows:

The respondent no.1/plaintiff no. 1 and appellant/defendant

knew each other since childhood. The respondent no. 1 approached the appellant in the year 1990 and expressed that he wanted an accommodation and asked appellant for his flat, which is suit flat. The respondents were allowed to stay in the appellant's flat on leave and licence basis and they were occupying the flat from 15th July, 1990 till 15th July, 1992. The respondent no. 1 was in need of residence, therefore, he gave offer to the appellant about the purchase of the suit flat, which was accepted by the appellant. So, the parties entered into an Agreement of Sale of the suit flat on 16th July, 1992. The consideration amount was fixed at Rs.6,45,000/- and it was agreed between the parties that the entire amount will be paid on or before 15th February, 1993. It is the case of the appellant that the day prior to 15th February, 1993, the respondent no. 1 went to the house of the appellant and offered him entire balance amount of Rs.4,00,000/-, as an amount of Rs.2,45,000/- was paid by the respondent no. 1 earlier. However, the appellant's wife refused to accept the amount, as appellant was not in town. Therefore, the respondent no. 1 sent a letter to the appellant requesting him to accept two Pay Orders comprising of Rs.4,00,000/-, however, the appellant neither accepted the same nor contacted him. It is the case of the appellant that the balance amount was not paid within the

stipulated time and the respondent no, 1 did not offer him the interest amount as agreed in the said Agreement. Therefore, immediately by issuing legal notice dated 15th March, 1993, the appellant cancelled the said Agreement (Exhibit 9). Thereafter, respondent no. 1 sent reply to the appellant and denied all the contentions. However, the appellant did not come forward to accept the money and also for execution of the Agreement. Therefore, the respondents filed suit for specific performance in High Court bearing No. 1582 of 1995, which was subsequently transferred to City Civil Court and numbered as 9374 of 1995. The appellant, after service of writ summons, appeared, filed written submissions and denied all the averments made and contentions raised in the plaint and categorically denied the visit and offer of payment of Rs.4,00,000/- by the respondent no. 1 to the wife of the appellant. It was further contended that the respondent no. 1 never intended to make payment and have failed to perform his part of payment of consideration amount with interest and therefore, by sending notice through his advocate, the appellant terminated the contract of 16th July, 1992. The trial Court framed issues on 23rd June, 2013 wherein the burden was placed on the respondents whether they are ready and willing to perform their part under the Agreement and so also the burden was cast on the

appellants to prove that the Agreement was validly terminated. The respondent no. 1 entered the box and gave evidence. He was cross-examined. Thereafter the appellant/defendant entered the box, gave evidence and was cross-examined by the respondent no.1. The learned Judge after going through the oral as well as documentary evidence of the parties, answered the issues in favour of the respondents/plaintiffs and held that the appellant/defendant failed to prove that the Agreement was validly terminated and decreed the Suit. While decreeing the Suit, the learned Judge directed the appellant/defendant to perform specifically the part of Suit Agreement within a period of two months upon the respondents/plaintiffs depositing the balance amount of Rs.4,00,000/- along with interest @9% p.a from 15th November, 1992 until it is paid. It is also further directed that the respondents shall pay the appellant all the outgoings paid by the appellant to the Society. Being aggrieved by the said judgment and order, the defendant filed this Appeal.

3. The learned counsel for the appellant has submitted that the learned trial Judge has erred in accepting the case of the respondents especially the fact that the respondents were ready and willing to perform their part under the Agreement. He submitted that

the essence of the Agreement and as per the Agreement, the balance payment was to be made on or before 15th November, 1992 and not later than 15th February, 1993. He submitted that there is no evidence to show that the respondents took efforts to pay the balance amount of Rs.4,00,000/- on or before 15th November, 1992. The respondents did not offer any amount of interest as agreed of 15% from November, 1992. The learned counsel has further submitted that the respondent no. 1 has failed to prove the contents in the notice sent to the appellant/defendant. The respondent no. 1 in fact could not prove the fact that he had visited the appellant's house and contacted his wife on 13th February, 1993 along with a common friend named Salgaokar. The learned counsel submitted that the respondents should have proved this fact after examining Salgaokar. However, Salgaokar is not examined. He further submitted that the appellant did not have any option but to terminate the said Agreement, which he has done by issuing legal notice immediately for cancellation of the contract. He further submitted that the respondents/plaintiffs were never put in possession of the suit flat but they were occupying the same till 1992 under Leave and Licence Agreement and since then, they are in unauthorized occupation of the suit flat. He further submitted that there was no

transfer of title in respondent's favour, as the Agreement of Sale does not create any right in his favour. He further submitted that the respondents/plaintiffs did not prepare the Agreement of Sale, did not deposit the balance amount during the pendency of the suit and thus, the respondents/plaintiffs could not establish the bonafide showing their willingness to perform the part of the contract. He further submitted that thereafter in November 1993, the appellant tried to settle the matter amicably by sending a letter through his counsel on 16th November, 1993, which is marked as Exhibit 12, however, the respondents did not respond to the said letter. He argued that the learned trial Judge has committed error in decreeing the suit and therefore, it is to be set aside.

4. The learned counsel for the respondents/plaintiffs submitted that the respondents/plaintiffs are in lawful possession and occupation of the suit flat since 1990. He submitted that by way of part performance, the respondents continued to be in possession after the impugned Agreement and after the suit was decreed. The learned counsel further submitted that there was no breach on the part of the respondents in payment of amount. The learned counsel relied on the letter sent by respondent no. 1 to the appellant stating

about his visit to the house of appellant and offering two Pay Orders of Rs.3,50,000/- of Saraswat Bank and Rs.50,000/- issued by State Bank of Patiala to the appellant's wife. He submitted the appellant's wife was not ready to accept any amount from the respondent. The learned counsel submitted that the respondents made part payment of the consideration amount. He further submitted that till December 1995, the respondents paid maintenance charges of the Society and were willing to pay further, however, the appellant issued notice to the Society that the Society should not accept maintenance charges from the respondents and therefore, the respondents could not pay the maintenance charges. The learned counsel submitted that the respondents were willing and ready to perform part of their contract and the Pay Orders which is brought on record in the cross-examination of the appellant and marked as Exhibit 26(Colly.) prove this fact. The learned counsel supported the order of the trial Court and submitted that the learned Judge of the trial Court has passed a correct and legal order and the suit is rightly decreed.

5. After hearing the submissions and going through the record and proceedings especially the impugned Agreement and letters sent by parties to each other, I am of the view that the only point of

dispute was that the payment was not made in time. The parties have agreed their earlier relationship as licensee and licensor. The title and ownership of the appellant is not disputed. The Agreement of Sale dated 16th July, 1992 and the amount of consideration mentioned therein as Rs.6,45,000/- for Flat No. 306 of Sheetal Apna Ghar Cooperative Housing Society are also admitted. Moreover, the deposit of Rs.1,00,000/-, which was the subject matter of leave and licence Agreement, was adjusted towards the consideration amount and thereafter Rs.51,000/- was paid on 6th July, 1992 was also not disputed. Subsequently, in the year 1992, the respondents paid Rs.49,000/- and thus, the respondents in pursuance to the impugned agreement paid total amount of Rs.2,45,000/- to the appellant. Thus, on 13th February, 1993, there was balance amount of consideration of Rs.4,00,000/-. On the background of all these admitted facts, the only fact which is disputed and the issue was to be answered by the trial Court was that whether the respondents/plaintiffs were ready and willing to perform the part of their obligations pursuant to the impugned Agreement, i.e., the payment of the balance amount.

6. On this point, the respondents have tendered evidence and relied on the cross-examination of the appellant/defendant. In his

chief, respondent no. 1 has stated that on 13th February, 1993, he went to the house of the appellant along with his friend Salgaokar and offered two pay orders to the wife of the appellant, however, as the appellant was not in the town, she did not accept the same. The respondents thereafter sent letter to the appellant on 13th February, 1993, i.e., on the same day, along with photocopies of the pay orders. My attention is drawn to the cross-examination of the appellant/defendant. In paragraph 8 of his cross-examination, the appellant was shown a letter dated 13th February, 1993 along with photocopies of the Pay Order. The appellant admitted the fact that respondent no. 1 sent him a letter along with photocopies of two Pay Orders comprising of Rs.4,00,000/-. Thereafter the Court marked the letter and Pay Orders collectively as Exhibit 26 and the appellant admitted that this letter was received by his wife when he was at Delhi. He has further deposed and admitted in the evidence that on 18th February, 1993 he returned from Delhi and thereafter he did not contact respondent no 1 and did not reply to the said letter. The fact remains that this letter was never replied by the appellant. Thus, the evidence of the respondents/plaintiffs is corroborated by the admission given by the appellant in his cross-examination and so also further corroborated by the letter and photocopies of the Pay

Orders which are marked as Exhibit 26. The time sequence is also to be taken into account on the fact to establish willingness and readiness of the respondents.

7. Let me advert to the impugned Agreement. It was agreed between the parties that the payment of balance amount was to be made on or before 15th November, 1992, however, it was admitted not paid on that date but it was further agreed that the amount was to be paid not later than 15th February, 1993 along with interest @15% p.a. This letter shows that on 13th February, 1993, the respondents have tried to pay the principal balance amount. My attention is drawn to the written statement of the appellant wherein in paragraph 21, he has stated that respondent no. 2 has visited the residence of appellant on 10th February, 1993 and she paid only the amount of Rs.10,000/- which was interest or part of the interest. My attention is also drawn to paragraph 9 of the cross-examination of the appellant wherein admission was given by the appellant that he has received Rs.10,000/- on 10th February, 1993 in cash, however, he did not remember that he received further cash of Rs.7,000/- towards interest. Thus, it can be safely inferred that the respondents were ready and willing to perform part of their contract, i.e., payment of

balance amount.

8. The time factor and correspondence between the parties throw light on the conduct of the parties and their willingness to perform part of their obligations. On 13th February, 1993, the letter was sent by respondent no. 1 along with photocopies of the pay orders and calling upon the appellant to execute the sale deed, however, it was not responded. On 19th February, 1993, other notice was sent by respondent no. 1 to the appellant. In reply to the said notice, the appellant sent legal notice through his advocate on 15th March, 1993, which is marked at Exhibit 9 and by that notice, the impugned Agreement was terminated. Again, respondent no. 1 replied to further notice dated 30th March, 1993 which is marked as Exhibit 10. It shows that many letters were exchanged between the parties immediately after the date of fulfillment of performance of Agreement as mentioned therein. It is also a fact that by letter dated 16th November, 1993 (Exhibit 12), the appellant took one step forward calling upon the respondents for settlement through the counsel, however, it appears that the respondents did not respond to that. Thus, it appears that not much issue is involved in the matter but somehow the parties could not settle the matter, which would have

been settled in the year 1993 itself and was unfortunately dragged till 2018.

9. The learned counsel for the respondents/plaintiffs, on instructions, makes statement that after the judgment and decree is passed by the trial Court, the respondents have deposited total amount of Rs.11,68,000/- in the trial Court, i.e., City Civil Court, which includes the balance amount of Rs.4 lakhs and interest @ 9% p.a. as ordered by the trial Court.

10. The finding given by the learned trial Judge on the issues are legal and correct and hence, no interference is required in the order passed by the learned trial Judge except in respect of payment of maintenance charges of the Society where some modification is required. Hence, First Appeal is dismissed with following order:

(i) The order of the trial Court is hereby confirmed but with following modification:

(a) The respondents shall pay all the outgoing charges of the Society from December 1995 till March 2014 to the appellant, whatever was paid by the appellant, with 9% interest on the said amount;

(b) The accounts of outgoing charges of the Society for the period from December, 1995 till March, 2014 are to be obtained from the Society on or before 28th February, 2018;

(c) The sale deed is also to be executed by both the parties on or before 15th April, 2018. The entire amount is to be paid at the time of execution of the Sale deed. If the appellant won't come forward to execute the sale deed, it is to be unilaterally executed through the Registrar.

11. The appellant/defendant is entitled to withdraw the amount of Rs.11,68,000/- along with interest accrued thereon and the Registrar of the City Civil Court is directed to facilitate the said withdrawal.

(MRIDULA BHATKAR, J.)