

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 1228 OF 2005

Shantaram Eknath Nikam & Ors. ... Appellants
Vs.
Raghunath Narayan Ganpule & Ors. ... Respondents

Mr. Rahul Shinde i/b Sanjay Kshirsagar, for the Appellants.

Mr. C. V. Lad, for Respondent Nos. 1 and 2.

Mr. S. D. Mulye, for Respondent Nos. 3 & 4.

CORAM : A. M. DHAVALA, J.

DATE : OCTOBER 11, 2018

ORAL JUDGMENT :-

1. Heard learned advocate Rahul Shinde, for the Appellants and learned advocate Mr. C. V. Lad, for Respondent Nos. 1 and 2. The substantial question of law in this appeal relates to the procedure adopted by the district judge in the first appeal.

2. The appellants herein are defendant Nos. 3 to 5. Respondent Nos. 1 and 2 are the original plaintiffs; and respondent Nos. 4 and 5 are original defendant Nos. 1 and 2

respectively. For the sake of convenience, the parties are referred to as per their status in the trial Court.

3. Original defendant Nos. 3 to 5 had executed development agreement in favour of defendant Nos. 1 and 2, and defendant No. 2 entered into agreement with the plaintiffs to sell flat No. 5, admeasuring 59 Sq. meters (carpet area) in the proposed building for a sum of Rs. 1,68,750/-. The plaintiffs as per the terms, advanced Rs. 10,000/- as an earnest money. The agreement dated 10.12.1987 was executed. The plaintiffs thereafter made further payment of Rs. 5,000/- on 26.10.1988 to defendant No. 2. Further payments were made, totaling to Rs.54,050/- to defendant No. 2. The plaintiffs claim that they are ready and willing to perform their part of the contract. Hence, the suit for specific performance and in the alternative for damages was filed on 18th December, 1991.

4. The defendants contested the suit by filing written-statement. Learned Civil Judge, S. D. Pune recorded the

evidence and answered all points on material facts in favour of the plaintiffs. For the reasons recorded, he held that, plaintiffs are not entitled for specific performance of the contract. Hence, suit was partly decreed to the extent of payment of Rs. 54,050/- with interest @ 9% per annum. Being aggrieved, the plaintiffs approached the district Court by filing Civil Appeal No. 1024 of 2000. The learned Principal District Judge allowed the first appeal by judgment and order dated 13.7.2005 granted a decree of specific performance. While doing so, the judgment itself shows that the learned District Judge did not hear the arguments of the learned advocates for the parties. He relied on notes prepared by his predecessor and decided the appeal. The same is challenged by way of second appeal.

5. Following substantial question of law has been framed:

Whether the procedure followed by the learned District Judge in disposing of the appeal without hearing the parties, and only on the basis of notes of his learned predecessor, is inconsistent with the provisions of Civil Procedure Code and contrary to the principles of

natural justice?

I record my finding to the substantial question of law in the affirmative and partly allow the appeal and remand the matter.

Reasons

5. The roznama of first appeal shows that appellant was heard in this appeal of 2000 on 3.1.2004. Thereafter from 14.1.2004, the matter was repeatedly adjourned for arguments of the respondents. One application (Exhibit 33) for permission to exhibit the document was filed on 12.2.2004; the matter did not proceed further. Then the matter was transferred from said judge to the Court of Principal District Judge, Pune, as can be gathered from different nature of signatures. On 12.2.2004 the predecessor of the appellate Court had recorded notes of argument, which include the arguments advanced by advocate for the appellant. Advocate Mr. Sutawane for respondent Nos. 1 and 2, and the respondents were absent. No arguments were advanced for respondent No. 1 and 2. Normally, when the judge is changed, the advocates are required to advance

arguments again, but the roznama shows that the matter was adjourned for arguments of respondent No. 2. His advocate did not advance the argument. In fact, advocate for the appellant was absent on 16.6.2005, 2.7.2005, and 8.7.2005 on the dates fixed, and the matter was adjourned for arguments. On 8.7.2005 when the advocate for the appellant was absent and did not advance any arguments, he had filed application for adjournment (Exhibit 41). The same was dismissed on 8.7.2005 and the matter was adjourned to 11.7.2005, and on 11.7.2005 learned District Judge delivered the judgment.

6. In para 5, the learned first appellate Court observed that:

“5. In the appeal, the learned advocates appearing on behalf of both the parties were elaborately heard by my learned predecessor who had taken the notes of the arguments. It is obvious from the said notes that the learned advocate appearing on behalf of the appellants has made a submission that the learned trial Judge has given a contradictory finding relating to the specific performance of the agreement. It is also submitted that in view of the clear admissions of defendant Nos. 2 to 5 and their pleadings, the learned trial Judge ought to have granted relief of specific performance of the agreement for sale. It is

further submitted that the learned trial Judge has overlooked the evidence relating to the fact that after the development agreement had been cancelled by the defendant Nos. 3 to 5, they had undertaken to discharge all the obligations arising out of that development agreement. It is contended that the learned trial Judge has committed obvious error in dismissing the suit for specific performance of the agreement for sale. The learned advocates appearing on behalf of the respondents in their submissions have emphatically supported the impugned judgment and decree.

6. The submission made at the bar are deeply considered. The impugned judgment and decree are also minutely examined in the premises of the pleadings of both the parties and evidence on record.
.....”

7. Here, it may be necessary to record that no arguments were advanced by advocate Mr. Sutavane appearing for Respondent Nos. 1 and 2, and he was not informed by the learned first appellate Court that he would be relying on the notes of arguments recorded by his predecessor and he should advance arguments. On the contrary, the first appellate Court recorded that the respondents had emphatically supported the impugned judgment and decree.

8. The principles of natural justice are recognised as part and parcel of the fair procedure, contemplated under Art. 21 of the Constitution of India. As per order Order 41, Rule 16 of C.P.C., the judge has to hear the advocates for the Appellant and he may dismiss the appeal or he may call respondents to argue the matter. If the advocate for the appellant is absent and does not advance any arguments, Order 41, Rule 17 mandates that the appeal has to be dismissed. There is no provision whereby the first appeal can be decided on merits without hearing the appellant. The explanation clarifying the position reads as under:

Order 41, Rule: 17. - (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed.

Explanation. - Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on merits.

9. In the present case, respondent Nos. 1 and 2 herein were the appellants and they had got only a money decree.

There was no decree of specific performance in their favour. The defendants were beneficiary of the partial decree and they were the respondents. The notes of arguments recorded by the predecessor of the first appellate Court had not disclosed that respondent Nos. 1 and 2 had advanced any arguments. The arguments were advanced by respondent Nos. 3 to 5.

10. Apart from the above defect, I find that there is no provision to decide the appeal on the basis of notes prepared by the predecessor of the Judge. If the appellant would have filed written notes of arguments, the judge could have relied upon it and could have called upon the respondents to advance the arguments. But there are no written notes of arguments. It was recorded that advocate for appellant was absent. It was fixed for arguments. As per O. 41, Rule 17, the appeal was liable to be dismissed for absence of the appellant or his advocate or it could have been adjourned. The learned District Judge did not record in the roznama that he was going to rely upon the notes of arguments recorded by his predecessor about one and half

years back. The roznama does not indicate that the learned appellate Court was even aware of the notes of arguments recorded. In fact, Exhibits 40, 41 were filed by the advocate for the Appellant for adjournment. Exhibit 40 was allowed and Exhibit 41 was dismissed. The learned advocate for the respondents must have assumed that appeal would be either dismissed or adjourned, and they were not even called upon to advance the arguments.

11. The learned first appellate court gravely erred in relying on the notes of arguments recorded by his predecessor more than one years back without any intimation to the respondent that he was going to do so. The procedure adopted by him was contrary to the provisions of Order 41, Rule 16 and 17 of C.P.C. He could not have relied upon the notes of arguments recorded by his predecessor, unless the parties had both given written notes of arguments.

12. When the parties advance arguments, they cover all

the points and they could expect that the judge should record each and every point. In writing, some points are recorded in his mind and some points are recorded in writing. I find that the course adopted by the learned first appellate court has caused serious prejudice to the right of hearing of the respondents. The partial decree in their favour has been reversed and decree for specific performance has been granted against them without hearing the respondent. The roznama, no doubt, shows that advocate for Respondent Nos. 1 and 2 was unnecessarily seeking adjournments from time to time. But once judge was transferred, the matter could not have been treated as part heard, and advocate for appellant was supposed to advance the argument again. Considering the facts, there is no alternative, but to set aside the judgment and remand the matter. I accordingly, answer the substantial question of law in the affirmative and pass the following order.

ORDER

- (i) The judgment and decree passed by the learned

District Judge, Pune dated 13.7.2005 in Civil Appeal No. 1024 of 2000 is hereby set aside and the appeal is remanded back to the first appellate court with a direction that he shall give reasonable opportunity to both parties to argue the matter, and decide the matter afresh on merits and in accordance with law. Civil appeal is accordingly restored.

- (ii) Considering the long pendency of the appeal before the first appellate court, it is directed that learned District Judge shall hear the parties and dispose of the matter within one month from the date of receipt of this order and record or from the date of uploading this order, whichever is earlier.
- (iii) In view of the above facts, the entire court-fee refund from this second appeal be given to the appellants, under S. 15 of the Maharashtra Court-Fees Act.
- (iv) Parties shall bear their own costs.
- (v) Decree be drawn-up accordingly.

Sd/-
[A. M. DHAVALE, J.]