

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.867 OF 2017
ALONG WITH
CIVIL APPLICATION NO.1801 OF 2017

Sunny Thomas Varghese	 Appellant-Applicant
V/s.	
Dipen Bhagwandas Panchal and Anr.	 Respondents

Mr. Omprakash Parihar for the Appellant-Applicant.

Mr. Ashutosh R. Gole for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 23RD OCTOBER, 2018.

P.C. :

1. Heard Mr. Parihar, learned counsel for the Appellant-Applicant, and Mr. Gole, learned counsel for the Respondents.

2. This Second Appeal takes an exception to the 'Judgment and Order' dated 20th January 2016 passed by the District Judge, Thane, thereby dismissing Civil Appeal No.131 of 2013, which was preferred against the 'Judgment and Decree' dated 15th March 2012, passed in Special Civil Suit No.164 of 2003 by the Civil Judge, Senior Division, Thane.

3. The said Suit was filed by the Respondents herein, seeking specific

performance of the 'Agreement of Sale' dated 29th March 2000. The Appellant herein has resisted the Suit on the ground that, the 'Agreement of Sale' was not pertaining to the 'Gala', but it was pertaining to the sale of the machinery.

4. Both the Trial Court and the first Appellate Court have, on proper appreciation of oral and documentary evidence on record, recorded a concurrent finding that, the 'Agreement', taken as a whole, makes it clear that it was for the sale of the 'Gala'. In view thereof, there is no substantial question of law raised or involved in this Second Appeal, as nothing is pointed out from the 'Judgments' of both the Courts below indicating any perverse appreciation of evidence or finding.

5. In this Second Appeal, a new point is tried to be raised by contending that, it was an 'Agreement of Leave and License', and not an 'Agreement of Sale'. In this respect, the attention is drawn to the cross-examination of the Plaintiff, wherein it is admitted that, the Appellant is still in occupation of the suit premises as a 'licensee'. Hence, it is urged that, it was not an 'Agreement of Sale'. However, this contention was neither raised in the written statement, nor before the Trial Court in the course of hearing or before the first Appellate Court. Therefore, such contention based on factual aspects, cannot be considered or raised in the Second Appeal. Even otherwise also, there is nothing on record to

substantiate it. Admittedly, the Appellant has not filed any Suit for eviction, nor, at any time, Respondents have paid the leave and license fees. The 'Agreement' shows that, the entire consideration towards purchase of the 'Gala' is paid, thereby indicating that, it was an 'Agreement of Sale', and not an 'Agreement of Leave and License'.

6. The Second Appeal, therefore, holds no merits; hence, stands dismissed.

7. In view of dismissal of the Appeal, Civil Application No.1801 of 2017 pending therein does not survive and the same stands disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]