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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 101 OF 2017
WITH
CIVIL APPLICATION No. 158 of 2017

Ramchandra Baburao Jadhav
(since deceased, through LR's.) & Anr. ... Appellants
Vs.
Maniklal Bhaanilal Tiwari ... Respondent

Mr. Pradeep S. Gole, for the Appellants / Applicants.

Mr. Manmath Athalye, for the Respondent.

CORAM : A. M. DHAVALE, J.
DATE : SEPTEMBER 5, 2018

PC :-

1. The Appellants herein are legal heirs of original defendants. In Special Civil Suit No. 330 of 1993, the plaintiff's (Respondent herein) prayer for specific performance of contract was rejected on the ground that he was not ready and willing to perform his part of the contract and there was breach of terms and conditions of the agreement. It was also argued as barred by limitation, and particularly, the prayer of identification of the

property. The suit came to be dismissed with costs by judgment and decree dated 30.9.2010.

2. In the appeal preferred by the plaintiff, the learned first Appellate Court negated findings of the trial court and decreed the suit. Hence, this appeal.

3. Heard the learned advocates for the parties.

4. On 17th March, 1991, the Appellant / original defendant had executed unregistered agreement to sell in favour of the Respondent / plaintiff in respect of 4R land from Survey No. 380/1 from Mauze Karanje. The suit land was described also by boundaries. It is situated near old Medha-Satara road and was bounded by field of Vitthal Jadhav from east. It was agreed to be sold for Rs.44,000/-, out of which amount of Rs.10,000/- was paid as an earnest money. The sale-deed was to be executed within one year. The defendant had agreed that during the intervening period, he will get the land measured and get the boundaries fixed and submit the map of measurement. In case of difficulty, he would allot the equal area of the land from

his another field, Survey No. 380/3. On 1st March, 1992 i.e. before completion of one year, the defendant had executed a writing in favour of the plaintiff. He expressed his inability to execute the sale-deed in favour of the plaintiff immediately, as agreed and he sought extension of time of three months from 31st May, 1992 and assured that he would complete the formalities, to be performed by him by the end of May 1992 and the sale-deed would be executed in June, 1992. He again reiterated that he would give 4R land either from Survey No. 380/1 or 380/3.

5. There are concurrent findings of both the courts below that these agreements and writings are duly proved. The plaintiff has pleaded in his plaint that he was always ready and willing to perform his part of the contract. The defendant in his written-statement came with a case that it was not a genuine agreement to sale, but it was a money lending transaction. Both the courts have not accepted the case of the defendants.

6. The defendants have alternatively pleaded that the

sale-deed was to be obtained within three months and the same was not obtained within three months, and therefore, the plaintiff's right has extinguished.

7. In the plaint, the plaintiff has claimed specific performance of sale of 4R land from Survey No. 380/7. It was earlier numbered as Survey No. 380/3. When the suit is filed within two years from the date of agreement, there can be no issue of limitation.

8. The defendant has not specifically pleaded that time was essence of the contract. In fact, period of one year was prescribed for execution of the sale-deed. The same was extended at the instance of the defendant. There were some liabilities on the defendant to be performed viz. he should get the land measured, get the boundaries fixed and produce the map of measurement. The written-statement does not disclose that these formalities were completed by him and has accordingly informed the plaintiff, and still the plaintiff has not taken any steps. Though the period of limitation was got

extended upto June, 1992, the plaintiff waited till the defendant completes his formalities. When the defendant could not complete it, the plaintiff issued notice in August, 1992, which was falsely replied and thereby the defendant had declined to execute the sale-deed and on 26th August, 1993 the suit was filed.

9. When the defendant took stand that there was no genuine agreement, it was a money lending transaction, the denial of readiness and willingness has no significance. The defendant has to prove that it was a money lending transaction and not agreement of sale. When he has failed to do that, it does not fit in the mouth of defendant that the plaintiff was not ready and willing to perform his part of the contract. I find that the plaintiff had approached the defendant for specific performance of contract before completion of one year. It was the defendant who expressed his inability to specifically perform the contract and he sought extension of time of three months. Even thereafter, though the notice was issued, the defendant

refused to execute the sale-deed. The notice was issued within short time after the period of three months extension was over. Considering the facts and circumstances, I find that first appellate court held that the plaintiff has proved readiness and willingness. The learned trial court has not considered these material aspects, which were rightly appreciated by the first appellate court, and there is no perversity, or consideration of inadmissible material, or ignorance of any vital material / admissible evidence on record. Therefore, there is no scope for interference in the said finding.

10. The main thrust of learned advocate for the Appellant was on the point of identification of property. The evidence on record and the judgment of appellate court shows that Appellant was owner of two lands, viz. Survey No. 380/1 admeasuring 45 R and Survey No. 380/3 admeasuring 48R. There are documents to show that the said survey number was reconstructed and different survey numbers were given to it. The lands mutation entry produced shows that lands of the

defendant were renumbered Survey No. 380/1, which was 45R was reduced to 42R and was renumbered as Survey No. 380/3. The area of 48R land in Survey No. 380/3 was increased to 54R and renumbered as Survey No. 380/7. Mutation entry (Exhibit 43) is self-explanatory and the learned first appellate court has rightly relied on it. Besides this, in the agreement as well as in the plaint, the description of the suit land is shown as land of 4R from Survey No. 380/3 situated near old Medha-Satara road. As per the map, now the land Survey No. 380/7 is adjacent to Medha-Satara road. The boundaries of the land are also given. If there is any mistake in the description of the property, the boundaries in the mutation shall prevail. The learned trial court has not given serious consideration to the identification of the property. The learned advocate has relied on judgment of the Apex Court in **Santakumari & Ors. Vs. Lakshmi Amma Janaki Amma (D) by LRs. & Ors.**¹ wherein it is held that the issue of interpretation of the documents of title is substantial question of law, if it goes to the root of title of the property. In the present

¹ (2000) 7 SCC 60

case, the ambiguity in respect of survey number has occurred due to subsequent change in the survey numbers and which has been properly explained by the documents on record. Therefore, this judgment will not be applicable to the present case, as there is no issue about identification of the property.

11. In the light of above facts, I find that there is no substantial question of law involved in the appeal, and therefore, it deserves to be dismissed and is accordingly dismissed in *limine*.

12. Pending civil application filed in the appeal does not survive and is accordingly disposed of.

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

Vinayak Halemath