

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 373/2018

(MADHUKAR NAGOJI MAHINDRAKAR & ANOTHER VERSUS PRADEEP PURUSHOTTAM NINAVE)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Shri S.S. Dhengale, counsel for the appellants.
 Shri M.R. Joharapurkar, counsel for the respondent.

CORAM : A.S. CHANDURKAR, J.

DATE : SEPTEMBER 28, 2018.

This appeal has been filed by the original defendants who are aggrieved by the decree for specific performance that has been passed by the appellate Court after setting aside the decree passed by the trial Court granting the relief of refund of earnest amount.

2. The facts in brief are that according to the plaintiff, there was an oral agreement with the defendants in respect of development of land admeasuring 1730 square feet. That agreement was with the plaintiff's wife in the year 2007 and in lieu thereof, the defendants executed a Power of Attorney in her favour. A total amount of Rupees Two Lakhs came to be paid in that regard. Subsequently on 02.12.2009, a written agreement for selling the suit property for a consideration of Rupees Thirteen Lakhs within a period of six months came to be executed. As per that agreement, the defendants were required to obtain necessary documents. The plaintiff issued notices on 17.02.2010, 21.04.2010 and 28.05.2010. Though these notices were replied, the sale-deed was not executed. Hence suit for specific performance came to be filed.

3. In the written statement, it was denied that there was an agreement of sale entered into with the plaintiff. Reference was however made to the earlier agreement in August-2007 on the basis of which a Power of Attorney was executed in favour of the plaintiff's wife. The receipt of amount of Rupees Four Lakhs was admitted.

4. Before the trial Court, the plaintiff examined himself as well as three other witnesses. The defendants failed to examine any witness. The trial Court held that the agreement dated 02.12.2009 was not duly proved and that the plaintiff was not ready and willing to perform his part of the contract. The relief of specific performance was refused and instead a direction to repay amount of Rupees Four Lakhs with interest came to be passed. In the appeal preferred by the plaintiff, the appellate Court held the agreement to be duly proved and on finding that the plaintiff was ready and willing to perform his part of agreement granted a decree of specific performance. The consideration was enhanced by Rupees Seven Lakhs and the same was directed to be paid within a period of three months. Being aggrieved, the defendants have filed the present appeal.

5. It is submitted by Shri S.S. Dhengale, learned counsel for the appellant that in absence of the agreement dated 02.12.2009 being duly proved, the appellate Court was not justified in coming to the conclusion that the plaintiff was entitled for the relief of specific performance. It was submitted that the amount of Rupees Four Lakhs that was paid was with regard to the earlier oral agreement for which the document of Power of Attorney came to be executed in favour of the plaintiff's wife. In absence of

the plaintiffs readiness and willingness being proved, the appellate Court was not justified in accepting the case of the plaintiff. It was further submitted that though the appellate Court passed a decree for specific performance, the enhancement in the amount of consideration as granted is on a lower side causing prejudice to the defendants. The market value of the suit property was much higher than as arrived by the appellate Court. It was thus submitted that the decree passed by the trial Court ought to be restored by setting aside the judgment of the appellate Court.

6. Shri M.R. Joharapurkar, learned counsel for the respondent-plaintiff, supported the impugned judgment. According to him, the agreement dated 02.12.2009 was rightly held to be duly proved. The appellate Court on considering the relevant evidence has accepted the case of the plaintiff. The defendants neither examined themselves nor proved their defence. The plaintiff having discharged his burden and also having proved his readiness and willingness, the decree passed by the appellate Court did not call for any interference. It was further submitted that the enhancement in the amount of consideration as awarded by the appellate Court was reasonable in the facts of the case and that aspect was not challenged by the plaintiff. In absence of any evidence to indicate the market value, no further enhancement in the amount of consideration was required.

7. I have heard the learned counsel for the parties and I have perused the evidence on record. As regards the agreement dated 02.12.2009 it has been found by the appellate court that its due execution had been proved. Though the defendants intended to contend that they were not aware

about the contents of the agreement at Exhibit 36, the defendants failed to lead any evidence and in absence of their version, the burden in that regard was not discharged. Though the signatures on the agreement at Exhibit 36 were admitted, the stand that the agreement was not intended to be acted upon was also not raised in the notices issued by the defendants. That finding recorded by the appellate Court is based on the evidence available on record and hence does not deserve to be interfered with.

8. It has also been found that under the agreement it was for the defendants to supply necessary documents for executing the sale-deed. The documents however were not obtained by the defendants and it was the plaintiff who took steps in that regard. Further in the notices dated 30.03.2010 and 28.05.2010 the willingness of the plaintiff has been indicated. The request to execute the sale-deed was made within a period of six months from the agreement. That finding also does not deserve to be interfered with.

9. The appellate court has in the facts of the case enhanced the amount of consideration by Rupees Seven Lakhs. It has taken into consideration the fact that amount of Rupees Four Lakhs was already paid by the plaintiff and by considering the increase at 7.5% per annum that enhancement has been granted. As noted above, the defendants failed to lead any evidence and hence the plea that the market price of the suit property was much more was not brought on record by leading any evidence. On that count, said contention of the defendants cannot be accepted.

10. It is thus found that the decree for specific performance has been passed after appreciating the entire evidence on record. The findings recorded are based on evidence available on record. The Second Appeal therefore does not give rise to any substantial question of law. Same is accordingly dismissed with no order as to costs.

JUDGE

APTE