IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.444 OF 2016
WITH
CIVIL APPLICATION NO.5444 OF 2018

Shaikh Bismillah s/o Sk. Abdul Bagwan

...**Versus**...

Rashidkha s/o Dalmirkha Pathan

...

Mr. Y.M. Khan, Advocate for the appellant

Mr. P.R. Patil, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20th FEBRUARY, 2019

ORDER :

1 Present appeal has been filed by the original plaintiff challenging the Judgment and Decree passed by learned Principal District Judge, Jalgaon in Regular Civil Appeal No.51/2008 dated 23.02.2015, whereby the appeal filed by the present respondent/defendant came to be allowed and the Judgment and Decree passed in Special Civil Suit No.32/2001 by learned Civil Judge Senior Division, Jalgaon dated 08.01.2008 came to be set aside and the said Special Civil Suit came to be dismissed.

2 Present appellant had filed the said Special Civil Suit No.32/2001 for specific performance of agreement dated 27.03.1991. He had come with a case that the defendant, who had purchased the entire suit property from one Shaikh Mohammad Shaikh Ahmed by way of sale deed dated 05.11.1979, had agreed to sell the said land by way of said agreement to sell. The said property was CTS No.357 area admeasuring 261.7 sqare meters. It consisted of different rooms and in fact, by way of conditional sale deed dated 07.02.1978 said Shaikh Mohammad Shaikh Ahmed had sold one room i.e. fourth room from North to South to the plaintiff, in which plaintiff was earlier tenant. Thereafter, the defendant had instituted R.C.S. No.196/1968 for redemption of mortgage, however, that suit came to be dismissed on 12.08.1992. According to the plaintiff, defendant has not preferred any appeal challenging the said dismissal of the suit. In the said agreement to sell dated 27.03.1991 defendant had agreed to sell the said land to the plaintiff for a consideration of Rs.1,65,000/-. Amount of Rs.11,000/- was given as earnest amount on that day. It was agreed between the parties that defendant would take possession of different rooms from the tenants and within a period of six months and then execute a sale deed in favour of the plaintiff. Thereafter, the defendant has delivered possession of one more room after it was vacated by tenant by name Eknath Barku Wani. According to the plaintiff, he was ready and

willing to perform his part of the contract. He had also paid certain amount subsequently and by the end of 1991 he had paid amount of Rs.56,000/- to the defendant. Thereafter, defendant issued notice dated 18.12.2000 to the plaintiff demanding possession of the said rooms and informed about the recession of the contract. The said notice was replied by the plaintiff on 01.01.2001 and he demanded specific performance of the agreement. Hence, the suit is filed for specific performance of the contract and in the alternative prayer is made in respect of refund of earnest amount of Rs.56,000/- together with interest @ 24%.

3 The defendant resisted the claim of the plaintiff by filing written statement. It is stated that the plaintiff was never ready and willing to perform his part of contract. Defendant is trying to get relief on the basis of the agreement to sell in the year 2001 and therefore the suit is beyond the period of limitation. The Civil Appeal No.67/2000 filed by her challenging the dismissal of R.C.S. No.196/1968 is pending before the District Court, Jalgaon. It is also stated that since he was in need of money for treatment of his mother, plaintiff had taken undue advantage of his situation and tried to get the suit property at 1/4th price of the then prevailing market rate and under constrained circumstances he had entered into agreement to sell. However, plaintiff was never ready and willing to perform his part of the contract, if at all, it is to be believed that it is an

agreement to sell and on these grounds dismissal of the suit was prayed.

4 Taking into consideration the rival contentions, issues came to be framed, parties have led oral as well as documentary evidence on record. The learned Trial Court held that defendant had entered into an agreement to sell dated 27.03.1991 with plaintiff as contended by the plaintiff. Plaintiff has proved that as part of consideration he has paid amount of Rs.56,000/- to the defendant. Plaintiff was ready and willing to perform his part of contract and therefore the suit was decreed. Defendant was directed to execute the sale deed by accepting the remaining amount of consideration.

5 The original defendant challenged the said Judgment and Decree in the aforesaid Civil Appeal, which was heard by learned Principal District Judge, Jalgaon. After hearing both parties, the appeal was partly allowed. The Judgment and Decree passed by the learned Trial Court was set aside. The relief of specific performance was refused. The alternative prayer of the plaintiff was allowed. Defendant was directed to pay amount of Rs.56,000/- together with interest @ 12% per annum from the date of the suit till actual realization. The original plaintiff has now challenged this Judgment and Decree in this Second Appeal.

6 Heard learned Advocate Mr. Y.M. Khan for appellant/original

plaintiff and learned Advocate Mr. P.R. Patil for respondent/original defendant. It has been vehemently argued by the learned Advocate for the appellant that the learned First Appellate Court did not appreciate the evidence properly. Both the Courts were concurring with the findings that defendant had executed the agreement to sell in favour of the plaintiff. However, the learned First Appellate Court erred in setting aside the findings in respect of readiness and willingness. The payments have been made by the plaintiff, so also the defendant had also given possession of another room to the plaintiff, in pursuant to the said agreement to sell. However, thereafter defendant kept mum and did not initiate any action to get the vacant possession of other rooms, which were admittedly occupied by the tenants. When the defendant had not taken any step, it cannot be said that the time was essence of the contract. It was agreed between the parties that the rest of the amount would be paid at the time of execution of the sale deed. Unless the tenants would have vacated the respective rooms, the sale deed could not have taken place and therefore, there was no question of showing readiness and willingness by payments or otherwise to the plaintiff. Reliance has been placed on the decision in **Kisan s/o Shripat Patil and another vs. Ragho s/o Vedu Patil, 2007(4) Mh.L.J., 311**, wherein after placing reliance on **Babulal vs. Hajarilal Kishorilal and others, AIR 1982 SC 818** held that

> "It is thus clear that the Apex Court has clearly held that in view of sub-section (3) of section 28 of the Specific Relief Act, it would be permissible for a party to claim a relief of possession or payment of the purchase money, as is ordered to be paid under the decree. If such payment is made and relief of possession is claimed, the Court would always be competent to grant such a relief. I further feel that on the contrary, such a relief would be one which would result in granting appropriate, just and proper relief in favour of a person in whose favour decree for specific performance is passed."

Therefore, in fact, the decree that was passed by the Trial Court was legal and proper, which ought not to have been disturbed in the first appeal. Substantial question of law is, therefore, arising in this matter.

7 Per contra, the learned Advocate appearing for the respondent relied on the observations by the First Appellate Court and submitted that the plaintiff had failed to bring that he was all along ready and willing to perform his part of the contract. He also submitted that in the agreement to sell itself a stipulation was made that within six months of the agreement to sell, the defendant would take steps to get the other rooms vacated from the tenants and if defendant fails to do that, then the sale deed would be executed to the extent of those rooms, by bringing down the consideration amount proportionately to the extent of those rooms only of which possession would be obtained by defendant till then. There was no attempt by the plaintiff after 1991 till 2001 to even make inquiry, as to what steps

have been taken by the defendant for getting the rooms vacated from the tenants. Therefore, the learned First Appellate Court was justified in passing the decree and granting only the alternative prayer in the suit. The discretion that is required to be exercised by a Court under Section 20 of the Specific Relief Act, it has been used properly and judiciously. Therefore, it cannot be said that there is any substantial question of law pointed out by the appellant.

8 At the outset, it is required to be seen, as to whether any substantial question of law has been pointed out by the original plaintiff, for exercising jurisdiction of this Court under Section 100 of the Code of Civil Procedure. As per the law laid down by Supreme Court in catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of CPC, after the 1976 amendment, is confined only when the Second Appeal involves as a substantial question of law. The existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the CPC.

9 A reliance can be placed on decision in **Ishwar Dass Jain vs. Sohan Lal** reported in **(2000) 1 SCC 434**, wherein it has been observed that -

> "Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not

permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

Therefore, it is now required to be seen, whether any substantial question of law can be raised by the appellant, taking into consideration the facts as well as evidence that has been adduced.

Therefore, taking into consideration the observations in the above said case and also on the decision in **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, wherein it has been held that

"In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in-admissible evidence or no evidence.

Further, it is observed in the said case that if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal.

10 Here, in this case though defendant had tried to contend that under constrained circumstances document was executed by him on 27.03.1991, yet when he admit the execution of the document, we cannot go further. Both the Courts have concurrently held that defendant had agreed to sell the suit property to the plaintiff by entering into an agreement of sale on 27.03.1991. The only point for consideration is, as to whether plaintiff was ready and willing to perform his part of the contract. If the pleadings as well as evidence adduced by the plaintiff is considered, it can be seen that whatever amount was advanced by him, as part of consideration, was till the end of 1991 and it was amounting to Rs.56,000/- only. There is absolutely no evidence given by him, as to what he did from starting of 1992 till the notice dated 18.12.2000 was issued by defendant to him. If he would have given the account of this period, then only we could have come to the conclusion that he had shown his readiness and willingness. It is also to be noted that delivery of possession of one more

room by the defendant was also in the year 1991 itself. He has not given the account, as to why he was not making inquiry with the defendant, as to what steps the defendant had taken to get the possession of other rooms from the respective tenants. The learned First Appellate Court has rightly considered the stipulation in the agreement to sell that it was agreed to execute the sale deed within six months from the date of the agreement and further stipulation was that if the two rooms in possession of the tenants are not vacated during the said period, the sale deed of vacant portion was to be executed by accepting proportionate amount only. Plaintiff could have insisted for specific performance of half of the portion because at that time the segregation of the terms could have been done. Further, it was stipulated that when the tenant would vacate those two rooms, then they would be sold to the plaintiff. That means, possession of the entire property at one time was not the condition precedent to execute the sale deed. There was no hurdle for the plaintiff to have sale deed executed in respect of the property, which was handed over to him during the aforesaid period, but he had not taken any such action. Therefore, he cannot be said to be ready and willing to perform his part of the contract, as there was no reason for him to wait till the notice was issued by the plaintiff to him. Further, the ratio laid down in **Kisan Shripat Patil and another** (supra) is not supporting the plaintiff, taking into consideration and the stipulations made

in the agreement to sell. Therefore, the facts as well as evidence have been properly appreciated by the First Appellate Court, the law which is applicable is also properly considered. Hence, substantial question of law is not arising in this matter. Hence, the Second Appeal is disposed of as not admitted.

11 Civil Application No.5444 of 2018 stands disposed of as a consequence of disposal of Second Appeal.

(Smt. Vibha Kankanwadi, J.)

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